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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 127

HENRY B. WALKER, JR., Trustee, Et Al., Petitioners,

versus

FELMONT OIL CORPORATION, Et Al., - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

HENRY B. WALKER,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. _____

HENRY B. WALKER, JR., Trustee, Et Al., - *Petitioners,*

v.

FELMONT OIL CORPORATION, Et Al., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 18, 1958.

OPINIONS BELOW.

The opinion of the District Court and the order and judgment thereon, printed in Appendix B hereto, *infra*, pp. 35 and 48, are reported in 136 F. Supp. 584. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 50, is reported in 240 F. 2d 912. The subsequent order of the Circuit Court of Appeals on petitions for rehearing and the order on mandate, printed in Appendix B hereto, *infra*, pp. 58 and 60, are unreported. The orders of the District Court dismissing the action are

unreported and are printed in Appendix B hereto, *infra*, pp. 61 and 62. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 63, is reported in 262 F. 2d 163.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 18, 1958 (Appendix B, *infra*, p. 67). A timely petition for rehearing filed on January 7, 1959, was denied on January 22, 1959 (Appendix B, *infra*, p. 67). An Order was entered by this Court on April 1, 1959, extending the time for filing petition for writ of certiorari to June 20, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

In view of the number of questions presented and their inter-relationship, and to avoid undue repetition, related questions have been grouped by subject matter.

I. The Discretion of the District Court.

(A) Whether any right to exercise discretion remains in the District Court after it has once exercised such discretion in assuming and retaining jurisdiction of this action for a period of more than three years.

(B) Whether the District Court abused its discretion, if any remained, in dismissing this action in which it had exercised jurisdiction for more than three years and in which the rights of the parties could be fully determined.

(C) Whether the nature and subject matter of this action present such exceptional circumstances as to warrant

the District Court's refusal to continue exercising jurisdiction thereof.

(D) Whether the Court of Appeals, in accepting pleadings in a case on appeal to it from an order of dismissal on the District Court's own motion, effectively substitutes its discretion to exercise jurisdiction for that of the District Court.

II. Practice and Procedure in the Circuit Court of Appeals.

(A) Whether the Federal Rules of Civil Procedure may be followed or applied by the Court of Appeals in the absence of any applicable rule of its own.

(B) Whether the Court of Appeals has the power to permit the filing of a supplemental complaint in a case on appeal from an order of dismissal on the District Court's own motion when the issues have not theretofore been joined nor trial commenced nor any evidence introduced.

(C) Whether the Court of Appeals, having granted appellants' motion for leave to file a supplemental complaint in a case on appeal from an order of dismissal on the District Court's own motion prior to all the issues being joined, and having granted defendants' motion for leave to file answers to such supplemental complaint, and having thereafter permitted the filing of such supplemental complaint and answers, is acting within its proper authority in subsequently issuing an order overruling appellants' said motion and treating said supplemental complaint and answers thereto as though they had been expunged from the record.

(D) Whether the Court of Appeals, in the proper exercise of its judicial functions, has the duty to keep written minutes or records of its orders so that the certified record

in the case will reflect what action the court took on motions made in open court.

III. Effect of Amended and Supplemental Pleadings.

(A) Whether the judgment of the District Court entered on September 30, 1957, can expunge from the record, or invalidate, or affect in any way, amended and supplemental complaints and answers thereto filed by leave of the Court of Appeals after the date of the District Court's judgment, which pleadings raise issues and pray for relief not before the District Court at the time the action was dismissed.

(B) Whether the judgment of the Court of Appeals, affirming the judgment of the District Court, can expunge from the record, or invalidate, or affect in any way, those pleadings filed by leave of the Court of Appeals after the date of the District Court's judgment.

(C) Whether a valid and subsisting action based on the pleadings filed in the Court of Appeals after the date of the District Court's judgment is currently pending in the Court of Appeals, which action must now be remanded to the District Court for further proceedings.

IV. District Court's Compliance with Mandate of Court of Appeals.

(A) Whether the District Court effectively complied with the mandate of the Court of Appeals in this case.

V. Jurisdiction.

(A) Whether jurisdiction exists in this case based on diversity of citizenship.

(B) Whether jurisdiction exists in this case based on constitutional questions.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in Appendix A to this petition, *infra*, p. 33). They include: K.R.S. 413.010; K.R.S. 413.150; 62 Stat. 930, 28 U. S. C. § 1331; 62 Stat. 930, 28 U. S. C. § 1332; 62 Stat. 964, 28 U. S. C. § 2201; 62 Stat. 964, 28 U. S. C. § 2202.

STATEMENT OF THE CASE.

The action, as originally filed July 16, 1954, merely sought a declaratory judgment quieting title in a trustee-owner of patents granted by the Commonwealth of Kentucky to lands lying in the Ohio River (Appendix C, *infra*, p. 73). Jurisdiction obtained based on diversity of citizenship, and the District Court assumed and exercised jurisdiction. Numerous pleadings were filed; additional parties plaintiff and defendant were added and the issues were enlarged to include the quieting of title to additional lands, including an island (Amended Complaint, Appendix C, *infra*, p. 73; Docket Entries, Appendix C, *infra*, pp. 68-71). Prior to any trial of the matter, an appeal was taken from a pre-trial judgment on certain legal issues (Appendix B, *infra*, pp. 35 and 48).

The Court of Appeals vacated the judgment and remanded the case to the District Court for a determination of two major questions first raised by the Court of Appeals: (1) whether jurisdiction exists, and (2) whether, if it does exist, it should be exercised (Appendix B, *infra*, pp. 54, 58 and 59). Thereafter a suit was filed in the Henderson Circuit Court of Henderson County, Kentucky, by the Farm Bureau Oil Company, Inc.—which is not a party to this

action—against numerous defendants, including all the parties to this action. This suit concerns itself with the proceeds of oil wells located on a small part of the lands here involved, but does not concern itself with any lands belonging to the original, sole plaintiff in this action, *i. e.*, Henry B. Walker, Jr., Trustee (Printed page 53a of Certified Record). A motion to stay proceedings pending state court adjudication was filed by one of the defendants and was opposed by all of the plaintiffs and two of the defendants (Printed pages 48a, 60a, 63a and 65a of Certified Record). A hearing was had on this motion. Shortly thereafter, without granting a hearing on the questions raised by the Court of Appeals and without ruling on the question of jurisdiction in accordance with the mandate of the Court of Appeals, the District Court summarily dismissed the action on its own motion, purportedly under its discretionary power, even though it had already assumed and exercised jurisdiction in the matter for a period of more than three years (Orders, Appendix B, *infra*, pp. 61 and 62; Docket Entries, Appendix C, *infra*, pp. 68-72). The petitioners herein, who were the plaintiffs below, appealed from this judgment of the District Court.

After the appeal had been perfected, plaintiffs-appellants filed with the Court of Appeals a motion for leave to file a second amended complaint which raised constitutional questions as additional grounds for jurisdiction and which prayed for injunctive relief as an additional remedy (Printed page 78a of Certified Record). The motion was granted and the second amended complaint filed on April 17, 1958 (Appendix C, *infra*, p. 76). As of December 1, 1958, the date of the oral argument herein, no defendant-appellee had filed an answer to the said second amended complaint (Docket Entries in Court of Appeals, Appendix C, *infra*,

p. 74). Just prior to the argument, plaintiffs-appellants filed with the Court of Appeals their motion for leave to file a second supplemental complaint to which motion the said second supplemental complaint was attached, which pleading raised the affirmative defense of the Statute of Limitations (Appendix C, *infra*, pp. 85 and 87).

At this juncture in their statement of the case, the petitioners must leave the record because the record of the ensuing proceedings is non-existent. Petitioners contend that the proceedings which occurred in open court are as follows (Affidavits, Appendix C, *infra*, pp. 89 and 92): During the course of the oral argument Judge Florence Allen, the Chief Judge, asked the plaintiffs-appellants if they wished their motion brought up at that time. Copies of the motion with the attached second supplemental complaint had been mailed to all the defendants-appellees, but additional copies were thereupon distributed to those present. Judge Allen then asked the defendants-appellees whether they had any objections to the motion. No objections were made. Thereupon, in open court, Judge Allen granted said motion. Counsel for two of the defendants-appellees then asked the Court for leave to file answers to both the second amended complaint and the second supplemental complaint. Judge Allen then asked the plaintiffs-appellants if they had any objections, and no objections were made. She thereupon granted the defendants-appellees leave to file answers within a reasonable time. On December 18, 1958, the Court entered an order overruling plaintiffs-appellants' motion for leave to file a second supplemental complaint (Appendix C, *infra*, p. 89). Not until petitioners attempted to procure the certified record in this case did they learn that there is no written order, or entry or minute in the record which relates to the above

proceedings in open court on December 1, 1958. Petitioners have made a serious effort to have the record corrected to reflect accurately the proceedings which took place, and have carried on an extensive correspondence with members of the court and opposing counsel (Appendix C, *infra*, pp. 94-104). One of the judges, Judge Martin, has made no reply. Judge Allen has given no indication to petitioners of her views on the matter (Appendix C, *infra*, p. 95). Judge Miller, in a lengthy letter contends that he understood that the motion was taken under advisement (Appendix C, *infra*, p. 96). Henderson County, one of the defendants-appellees represented at the hearing, now supports the contention of Judge Miller (Appendix C, *infra*, p. 101), although an earlier letter to the Clerk of the Court is susceptible of a contrary interpretation (Appendix C, *infra*, p. 93). Two of the defendants-appellees represented at the argument agree, in general, with the contention of the petitioners (Appendix C, *infra*, pp. 102 and 104). In support of their contention, petitioners submit the following: The second supplemental complaint is on file with the Clerk of the Court and is stamped "FILED DEC. 1-1958 CARL W. REUSS, CLERK" (Appendix C, *infra*, p. 87; also Certified Record). Two defendants-appellees, including Henderson County, asked for and were granted leave to file answers to the second supplemental complaint. Four defendants-appellees, including Henderson County, did file answer to the said second supplemental complaint and referred to said complaint as being "filed" herein (Appendix C, *infra*, pp. 87 and 88). Counsel for Henderson County, in a letter to the Clerk stated he understood the second supplemental complaint had been filed (Appendix C, *infra*, p. 93). Petitioners, in their petition for rehearing, set out what had occurred (Point I, in Peti-

tion for Rehearing and Memorandum in Support Thereof, included in Certified Record). Petitioners' position was neither denied nor refuted nor referred to in the Court's order denying the petition for rehearing (Appendix B, *infra*, p. 67).

The judgment of the Court of Appeals sustaining the judgment of the District Court was entered on December 18, 1958 (Appendix B, infra, p. 67). A timely petition for rehearing was denied on January 22, 1959, by order of the Court, without written opinion (Appendix B, *infra*, p. 67).

REASONS FOR GRANTING THE WRIT.

In view of the number of questions presented and their interrelationship, the reasons for granting the writ will be grouped under subtitles which correspond to the subject matter of related questions as heretofore set out under QUESTIONS PRESENTED. It is necessary to deal with these matters at some length in this petition because the opinion below failed not only to rule on, but even to consider, most of the points here involved.

I. The Discretion of the District Court.

(A) The Court of Appeals in the instant case has indirectly decided an important question of federal law which has not been, but should be, settled by this Court. That question is set out as I(A) under QUESTIONS PRESENTED. By failing to rule otherwise, the Court of Appeals, in effect, has held that the District Court—after having once exercised its discretion and after having assumed and retained jurisdiction in the case for a period of

more than three years—still retains the power to exercise discretion again in declining jurisdiction and dismissing the action. Petitioners have been able to find no case in point. However, such a proposition is abhorent to logic and conflicts, in principle, with numerous decisions. The basic premises involved have been urged in the court below in brief and arguments and are both simple and irrefutable. The discretion of the District Court is nothing more than the right of option or choice to take or refuse jurisdiction of a case. That discretion is exercised once the court chooses to take and assume jurisdiction. When an option is exercised—that is, when the choice is made—the right is extinguished. An option is a one-time, one-use, expendable commodity. So it is with the court's discretion. Once it has been exercised, no discretion remains. The conclusion is inescapable that, if the court's discretion is exhausted once it has been exercised, the court then has the duty to retain jurisdiction and is without power to dismiss. Any other rule of law would establish a practice which would leave litigants in a constant state of confusion and uncertainty in any case which might seem or become burdensome to a court. This conclusion in no way abridges the court's inherent power to dismiss an action at any time in the event it discovers that jurisdiction does not, in fact, exist.

While the reasoning is different, the same end result is arrived at in a number of decisions. The principle is well expressed by the court in *Firemen's Ins. Co. of Newark* v. *Smith*, 83 F. Supp. 668, 672 (W. D. Mo., 1949), in these words:

> "The court, having assumed jurisdiction, it is the duty of the court to determine all the issues as between the parties, and to make a full and complete disposition of the entire case. *Tennessee Coal, Iron & R. Co.* v.

Muscoda Local No. 123, etc., 5 Cir., 1943, 137 F. 2d 176, affirmed 321 U. S. 590, 88 L. Ed. 949, 152 A. L. R. 1614; *Coon* v. *Bottolfsen*, D. C., 60 F. Supp. 316; *Home Ins. Co. of N. Y.* v. *Trotter*, 8 Cir., 130 F. 2d 800."

See also *Manchester Gardens* v. *Great West Life Assurance Co.*, 205 F. 2d 872, 875 (C. A. D. C., 1953).

The Court of Appeals in the instant case has held that there was no abuse of discretion by the District Court in dismissing this action. The issue involved is raised as I(B) under QUESTIONS PRESENTED. In view of the authorities cited above, it seems clear that the court abused its discretion, if any remained, or failed in its duty if there was no discretion. Neither the appellees nor the court below in its opinion answered or refuted these points. They merely ignored them.

(B) The decision of the court below in the instant case is in direct conflict with a decision of the Supreme Court. Petitioners cited and discussed at length in brief and argument the case of *Meredith* v. *Winter Haven*, 320 U. S. 228, 88 L. Ed. 9 (19), which relates in detail those actions in which the nature and subject matter confer on the court a discretionary power as to the exercise of jurisdiction. Since the authorities cited in the *Meredith* opinion include actions for declaratory judgments as well as other kinds of actions, it must be concluded that the exercise of jurisdiction in a declaratory judgment action is largely based on the same considerations as are given any other action. As a matter of fact, the *Meredith* case was an action for a declaratory judgment seeking a declaration on questions involving Florida constitutional and statutory law, as well as seeking injunctive relief as an implementation of this declaration. In this respect, it was a combined action for a declaratory judgment and an injunction, just as the instant case by its

second amended complaint is a combined action for a declaratory judgment and an injunction. In the *Meredith* case this Court held that the petitioners therein were entitled to have their action adjudicated in the foreign courts. At page 234 of its opinion this Court states:

> "But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. (Authorities cited.) When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Under the circumstances, the law as stated in the *Meredith* case is controlling and the decision of the Circuit Court of Appeals in the instant case is in direct conflict therewith.

The District Court's order of dismissal in the instant case feebly attempts to assert exceptional circumstances so as to invoke the discretionary powers of courts of equity

and thereby decline jurisdiction. In that order the District Court states:

> "This case does involve difficult questions requiring interpretation of state laws that affect the public policy of Kentucky, and since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings that could lead to a possible conflict between state and federal rulings."

A statement such as this is an absolutely necessary prerequisite to try to bring the instant case within the classification of those in which discretion might be exercised in refusing jurisdiction. On the other hand, the court's position is untenable if its statement above is successfully disproved. Petitioners have disproved this statement on every count, and their contentions have gone unrefuted and uncontroverted—and been completely ignored.

Let us analyze briefly the contentions of the District Court. First, that the case involves "difficult questions requiring interpretation of state laws that affect the public policy of Kentucky." The case involves, *inter alia*, the ownership of lands granted by patent from the Commonwealth of Kentucky. It is a general principle of law that a land grant is a contract, within the protection of the Federal Constitution. *Appleby* v. *New York*, 271 U. S. 364, 391, 70 L. Ed. 992; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 24, 35 L. Ed. 363; *American Emigrant Co.* v. *Adams County*, 100 U. S. 61, 25 L. Ed. 563; *Davis* v. *Gray*, 16 Wall. (U. S.) 203, 232, 21 L. Ed. 447; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87, 137, 3 L. Ed. 162; *Huidekoper* v. *Douglass*, 3 Cranch (U. S.) 1, 70, 2 L. Ed. 347. Hence, a contract between an individual and the state is protected by the Constitution equally with a contract between private parties. *Columbia*

R. Gas & E. Co. v. *South Carolina*, 261 U. S. 236, 67 L. Ed. 629; *Aikins* v. *Kingsbury*, 247 U. S. 484, 62 L. Ed. 1226; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87, 135, 3 L. Ed. 162. Petitioners have alleged that the Commonwealth of Kentucky and its State Property and Buildings Commission have attempted to deprive them of their property without due process of law and impaired the obligations of their patent contracts. It may well be that the abrogation of patent contracts is the public policy of the Commonwealth of Kentucky done in accordance with state law. If so, the issue should certainly be settled in a federal court rather than a state court where the rights of citizens of other states might conceivably be given less protection. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 88 L. Ed. 9, 13 (1943); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). The statement by the District Court wholly fails on this point.

The patents here involved are regularly issued; are signed by the proper officers; are in due form and are presumably valid and are, therefore, not subject to any collateral attack, but can be set aside only in judicial proceedings instituted on behalf of the state. 42 Am. Jur., Public Lands, § 86, p. 861; *United States* v. *Price*, 111 F. 2d 206, 208 (C. A. 10, 1940). It does not require the interpretation of state laws affecting the public policy of Kentucky for the court to determine that the patents are not subject to collateral attack by any of the parties defendant and that the Commonwealth of Kentucky has never brought any proceedings to have them set aside. Such an action is now barred by the Kentucky Statute of Limitations which by its specific terms applies to the Commonwealth as well as to private persons. Kentucky Revised Statutes 413.010, 413.150 (Appendix A, *infra*, p. 33). The application of

the Statute of Limitations hardly involves difficult question requiring interpretation of state law. All of the other issues involved in the merits of petitioners' case involve well-settled law. Thus the statement by the District Court wholly fails on this point also.

The District Court's order states further: "since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings . . . ." This observation indicates that the court had no comprehension of the issues involved. As has been pointed out previously herein, this action was initially filed by Henry B. Walker, Jr., Trustee, to quiet title in him to lands granted by patent by the Commonwealth of Kentucky. Later, other parties plaintiff were added and consequently other lands became involved. In the state court suit, filed more than three years after the District Court action by a pipeline company over the proceeds of oil from a small part of the lands involved in the District Court suit, Henry B. Walker, Jr., Trustee, is named a party defendant. Yet he neither owns, nor claims to own, any of the land involved nor has any interest in, nor claims any interest in, the proceeds of the oil involved, which proceeds are the *res* of the state action. For the court to say that the rights of the parties can be determined in the pending state action is both ridiculous and irresponsible. In the state court suit, Henry B. Walker, Jr., Trustee, can have none of his rights determined; he cannot have the title to his lands quieted in him; he cannot obtain the injunctive relief and other relief he has prayed for; and, finally, he cannot assert the affirmative defense of the Statute of Limitations. These rights should have been protected by the District Court and the Court of Appeals. A grave injustice has been committed in dismissing this action. In addition, the decision

is in direct conflict with numerous decisions which hold to the effect that the court first acquiring jurisdiction is entitled to maintain the same until its duty is fully performed and its jurisdiction is exhausted. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231, 67 L. Ed. 226, 231 (1922); *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. 2d 925, 930 (C. A. 3, 1941); *Maryland Casualty Co.* v. *Consumer's Finance Service, Inc.*, 101 F. 2d 514, 515 (C. A. 3, 1938); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). Thus the statement by the District Court wholly fails on this point also.

(C) The decision of the court below in the instant case relies on a number of Supreme Court cases as authorities for holding that it was a proper exercise of discretion by the District Judge to decline jurisdiction in a declaratory judgment action "of this kind." None of the cases cited were "of this kind." Far from supporting the proposition relied on by the Court of Appeals, these cases conflict in principle with the opinion in the instant case. The authorities relied on by the Court of Appeals in its opinion are the following:

(1) *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407 (1943), which was an action for a declaratory judgment involving a state tax matter in which an adequate remedy was provided in the state courts, so that it came within the statutory limitation imposed on district court jurisdiction by 28 U. S. C. A. Sec. 1341 and, in addition, the questions involved were state matters and were such that equitable rulings had conferred discretion on the court;

(2) *Pennsylvania* v. *Williams*, 294 U. S. 176, 79 L. Ed. 841 (1935), which was *not* an action for a declaratory judg-

ment but was a petition to intervene in a receivership suit and involved the liquidation of an insolvent state bank by a state officer, so that the subject matter was such that equitable ruling had conferred discretion on the court;

(3) *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424 (1943), which was *not* an action for a declaratory judgment but for an injunction which involved the domestic policy of the state in governing its administrative agencies, so that equitable rulings had conferred discretion on the court;

(4) *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 85 L. Ed. 971 (1941), which was *not* an action for a declaratory judgment but for an injunction, and discretion was conferred on the court because the case was concerned with delicate constitutional questions of great public interest involving Negro rights, which questions the Court held should first be litigated in the state courts;

(5) *Public Service Commission* v. *Wycoff Company*, 344 U. S. 237, 97 L. Ed. 291 (1952), which was an action for a declaratory judgment in which relief was denied because the Court did not feel that there was an actual controversy and declaratory relief would have foreclosed an administrative agency from making an initial decision in a matter subject to its jurisdiction;

(6) *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 86 L. Ed. 1620 (1942), which was an action for a declaratory judgment in which the cause was remanded to the district court for inquiry into the extent and adequacy of a *prior* similar action in a state court;

(7) *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 95 L. Ed. 1002, (1951), which was *not* an action for a declaratory judgment but for an

injunction and involved the regulation of intrastate railroad service wherein an adequate state court review of an administrative order was available.

Each of these cases serves to emphasize the fact that the subject matter of an action is the principal consideration neither in conferring discretion on the court or in justifying the exercise of discretion in refusing jurisdiction. Each of them is clearly distinguishable from the case at bar and completely inapplicable as controlling authority in a declaratory judgment "of this kind". Petitioners argued the inapplicability of these authorities in brief, reply brief, oral argument and petition for rehearing—but to no avail.

(D) The decision of the Court of Appeals in the instant case is in conflict with numerous decisions of other circuits. The general rule is that the Declaratory Judgment Act should be liberally construed and jurisdiction should not be declined in the absence of some cogent reason or exceptional circumstances. In the case of *Maryland Casualty Co.* v. *United Corporation*, 111 F. 2d 443 (C. A. 1, 1940), it was determined that a pending state court suit could not decide all of the questions presented to the District Court. At page 446 the court says:

> "Under such circumstances it has been held, we think rightly, that the application of an insuror for a declaratory judgment cannot be denied as a matter of discretion."

In *United States Fidelity & Guaranty Co.* v. *Koch*, 102 F. 2d 288 (C. A. 3, 1939), at page 294, the court holds that if the judgment will serve a useful purpose and if it will finally settle the litigation, "the declaration must generally be issued". In *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613 (C. A. 7, 1939), at page 616, the court states:

> "A federal court must exercise its jurisdiction in the absence of a showing of facts which constitute a recognized legal ground for a refusal to pass upon the merits of the cause which properly is before it."

See also: *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703, 709 (C. A. 3, 1940); *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 101 F. 2d 514, 515 (C. A. 3, 1938); *American Casualty Co. of Reading, Pa.* v. *Howard*, 173 F. 2d 924, 927 (C. A. 4, 1949); *Tennessee Coal, Iron and R. Co.* v. *Muscoda Local No. 123, etc.*, 137 F. 2d 176, 179 (C. A. 5, 1943); *Mutual Life Ins. Co. of New York* v. *Krejci*, 123 F. 2d 594, 596 (C. A. 7, 1941); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). Not only is the decision in the instant case in conflict with decisions which have been rendered by the other courts of appeals on this point, but it is contradictory to decisions rendered by the same court of appeals. In the case of *Maryland Casualty Co.* v. *Faulkner*, 126 F. 2d 175, 178 (C. A. 6, 1942), the Court of Appeals states the petitioners' position in clear and unambiguous terms:

> "The Congress having conferred upon the federal courts the power to grant declaratory relief in an appropriate case, the right to it is not lightly to be denied . . . The remedy of a declaratory judgment will be refused, granting the court has discretion to decline it, only if it will not finally settle the rights of the parties."

See also: *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F. 2d 105 (C. A. 6, 1939); *Employers Liability Assur. Corp. Ltd.* v. *Ryan*, 169 F. 2d 690, 691 (C. A. 6, 1949); *Dominion Electrical Mfg. Co.* v. *Edwin L. Wiegand Co.*, 126 F. 2d 172, 175 (C. A. 6, 1942).

(E) While petitioners feel that there are numerous authorities to support their contentions, in principle, in regard

to the questions relating to discretion, there seem to be no decisions squarely in point on the questions set out as questions I(A) and I(B) under QUESTIONS PRESENTED. These are important questions affecting numerous litigants in the district courts. There was no direct holding or ruling on these questions by the Court of Appeals, yet the precedents established by its decision could have a deleterious effect on the federal judicial system and cause hardship to countless litigants. For this reason petitioners feel that this Court should settle this matter and thus clarify the uncertainties which now exist in relation to these questions. The Federal Judicial System was initially set up for the purpose of adjudicating matters of this very nature and thereby affording to the citizens of these United States a protection which they might be denied in the courts of the various states. In the case of *The Bank of the United States* v. *Deveaux*, 5 *Cranch* 61, 3 L. Ed. 38, Chief Justice Marshall comments on the reasons and purposes behind the establishment of the Federal Judicial System in these words:

> "The Judicial Department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizens or between citizens of different states. (p. 87)"

Our courts must not be allowed to lose sight of the fact that their chief purpose is the protection of the rights of

our citizens when they are litigants. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 88 L. Ed. 9, 13 (1943).

(F) The Court of Appeals has decided an important quesion of federal law which has not been, but should be, settled by this court. Petitioners have been unable to find any decision which answers the question set out as I(D) in QUESTIONS PRESENTED hereinabove. That question was formulated from petitioners' contention that the Court of Appeals effectively overruled the judgment of the District Court and effectively retained jurisdiction of the action by permitting the filing of pleadings in the Court of Appeals. Let us assume, for the sake of argument only, that the District Court had the discretion to dismiss the action as it did. It is well recognized that the Court of Appeals may substitute its judgment for that of the District Court. *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 968 (C. A. 9, 1942). Once the District Court has dismissed an action, it is no longer a currently pending action. If the District Court accepts further pleadings such as an amended complaint it has effectively reassumed jurisdiction and reinstated the action. Following such a procedure, a new order of dismissal would be required to terminate the action. On an appeal from an order of dismissal in the District Court, the Court of Appeals has jurisdiction of the case, but, barring a decision to reverse the District Court, that jurisdiction is limited and circumscribed in that it concerns the naked record in the District Court. However, in accepting pleadings, the Court of Appeals is substituting its discretion for that of the District Court. It is thus effectively overruling the judgment of the District Court and reinstating the action as a currently pending action. As a currently pending action its status is of an entirely different character than that of a dismissed action

on appeal. It would seem that the question on appeal of the order of dismissal would become moot. The Court of Appeals in the instant case ignored and failed to answer or comment on this argument advanced by petitioners, and the question should be answered by this Court.

(G) All of the questions having to do with the existence of discretion and its proper exercise are of extreme importance and affect the rights of numerous litigants in the Federal Courts.

II. Practice and Procedure in the Circuit Court of Appeals.

(A) In stating, in its opinion herein, that the Federal Rules of Civil Procedure govern the procedure in the District Courts, not the Court of Appeals, the Court below was completely evading the issue before it. No one would argue that the Federal Rules govern or control the procedure in the Court of Appeals. On the other hand, it is settled law that a Court of Appeals may make its own rules and adopt any rules it deems wise and, by the same token, may waive its adopted rules whenever necessary. In the case of *United States* v. *Breitling*, 20 How. 252, 254, 15 L. Ed. 900, 902 (1858), this Court clearly states that it is always within the power of a court to suspend its own rules whenever the purposes of justice so require. It follows then that the Court of Appeals can adopt or follow or apply any Federal Rule it chooses to, provided such Rule is not in conflict with settled law applying to the Court of Appeals. In the instant case petitioners filed a motion for leave to file an amended complaint and suggested that the court had the power to grant the motion under Rule 15(d) of the Federal Rules of Civil Procedure. Rule 15(d) would not have conferred any absolute right on the petitioners even

in the District Court. The granting of the motion was entirely discretionary with the court. However, even though the Rules do not "govern or control" the Court of Appeals, Rule 15(d) could be followed or applied in granting the motion, which petitioners contend was done. In the case of *Hines* v. *Royal Indemnity Co.*, 253 F. 2d 111 (C. A. 6, 1958), the court states at page 113:

> "The Court of Appeals, under its authority to make its own rules, has in several circuits adopted the Rules of Civil Procedure, either in whole or in part, where applicable, as a part of its own rules. . . . In other instances the provisions of a certain rule of the Rules of Civil Procedure have been applied by analogy by appellate courts."

It seems remarkable that this same Court of Appeals, in its decision in the instant case, states that appellants' reliance on Rule 15(d) is misplaced since the Rules do not govern the procedure in the Court of Appeals and cites the *Hines* case as authority therefore. In their petition for rehearing, petitioners pointed out the inaplicability of the *Hines* case as authority for the court's proposition and pointed out its authority for petitioners' proposition that the Rules could be followed or applied, but the court ignored this argument and failed to comment thereon.

(B) On the question of the power of the Court of Appeals to permit the filing of a supplemental complaint in the instant case, the Court of Appeals has decided an important question of federal procedure which has not been, but should be, settled by this court. That power, from the point of view of the rules of court, has been discussed in Subsection (A) immediately hereinabove. Here we will touch briefly on another aspect. The Court of Appeals in its opinion in the instant case states:

> "A new issue, not raised by the pleadings in the District Court or considered by it, cannot be raised for the first time on appeal."

and cites four cases as authorities therefor (Appendix B, *infra*, p. 66). Petitioners in their petition for a rehearing carefully distinguished each of the four cases from the instant case and showed that none was in point on the issue here involved (Point IV. in Petition for Rehearing and Memorandum in Support Thereof, included in Certified Record). In the instant case the appeal was from an order of dismissal on the District Court's own motion after it had exercised jurisdiction for more than three years. Trial had not commenced nor had any evidence been introduced. At the time of filing the second supplemental complaint not one defendant had filed an answer to petitioners' amended complaint. After the order of dismissal by the District Court no opportunity was afforded to plead further.

This Court might well wonder why the second supplemental complaint was filed by petitioners in the Court of Appeals. In considering whether jurisdiction of a case should be retained, an appellate court should be concerned with the question of whether the relief prayed for can be granted and whether a final judgment can settle the issues raised by the complaint. In their brief on appeal, the petitioners herein stated their proposed course of action for a determination of all the issues for which the action was brought. They asserted the proposition that the patents were not subject to collateral attack. They also asserted that the patents could only have been set aside by a direct action by the Commonwealth of Kentucky and that the Statute of Limitations was now an effective bar to such direct action. These assertions were not denied or controverted by any of the defendants. The petitioners filed their

second supplemental complaint asserting the affirmative defense of the Statute of Limitations, not for the purpose of obtaining a ruling thereon by the Court of Appeals, but for the purpose of assisting that court in determining whether all the issues raised by the complaint could be settled by a judgment of the District Court and whether the relief prayed for could be granted. It has been held that supplemental pleadings were proper when the ends of justice were advanced, when substantial rights of parties were not violated and when the controversy could thus be simplified. *Missouri Rate Cases*, 230 U. S. 474, 496, 57 L. Ed. 1571 (1913); *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 203, 83 L. Ed. 598 (1939); *Adams County v. Northern Pacific Railway Co.*, 115 F. 2d 768, 774 (C. A. 9, 1940). Petitioners herein were not seeking a decision on the merits of the case. This fact distinguishes the case at bar from those cases holding that an issue cannot be raised for the first time on appeal. In those cases relied on by the Court of Appeals in its opinion, the parties sought a determination by the Court of Appeals on the new issue raised therein. On this issue petitioners believe this is a case of first impression and since the issue is an important procedural one it should be resolved by this Court.

(C) The proceedings in the Court of Appeals have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioners have already recounted the proceedings which occurred in open court on December 1, 1958, in reference to the granting of their motion for leave to file a supplemental complaint and the granting of two defendants-appellees' motions for leave to file answers thereto. As was pointed out, the supplemental complaint was marked "Filed" and answers were subsequently filed

thereto by four defendants-appellees. On December 18, 1958, the court entered an order overruling petitioners' motion for leave to file a supplemental complaint and on the same date affirmed the judgment of the District Court. Petitioners take grave exception to these proceedings on several bases.

In the first place, if petitioners' assertions of what occurred are correct, the attempt by the Court to overrule petitioners' motion after it had been granted and after the supplemental complaint had been filed and after answers thereto had been filed is most irregular. It would seem to be nothing more than an abortive and ineffectual attempt to expunge from the record pleadings which were incompatible with the decision which the Court of Appeals had reached. While the granting of the motion in the first instance was certainly within the discretion of the Court, once the motion was granted and pleadings filed by five parties in reliance thereon, the Court should have protected the validity of its own rulings. Any other course can only serve to undermine the foundations of our entire judicial system and cause continuing confusion in all litigation. In the event the Court seriously had questioned its own authority to grant said motion after having done so, it could have accomplished the same result by remanding the case to the District Court with directions to permit the filing of the supplemental complaint therein.

In the second place, if petitioners' assertions as to what occurred are not wholly correct, or if any member of the Court had any impressions which differed materially from those of petitioners, it would seem that any normal or accepted procedure would have compelled the Court to state its views in some form. In their petition for rehearing and memorandum in support thereof, petitioners made

assertions similar to those contained herein and alleged error on the part of the Court for its actions in the matter (Point I, in Petition for Rehearing and Memorandum in Support Thereof, included in Certified Record). The petition for rehearing was denied without comment or opinion. In neither replying to, nor refuting, nor clarifying the situation, the Court, in petitioners' opinion, was compounding its error. Certainly it owed a duty to the litigants to clear up a misunderstanding if it felt that petitioners in good faith were wrong in their interpretation of the proceedings. It would seem that silence from the Court was an implied acquiescence in petitioners' assertions.

In the third place, it seems highly improper that the Court of Appeals should have no written record or minutes of its proceedings and rulings. There are enough hazards for litigants in any litigation, without adding the unnecessary pitfall of having no record of how the court ruled on certain motions and whether certain pleadings were actually filed or merely tendered.

In the fourth place, since it was the error of the Court of Appeals that no record was being kept and the petitioners were without knowledge of that fact until they attempted to obtain the certified record, the Court of Appeals should have taken steps on its own initiative to correct the situation. There seems to be no particular recognition on the part of the members of the Court of any fault on the part of the Court that no record was kept. The suggestion made by one of the judges that a stipulation be obtained from all attorneys of record was completely unrealistic; first, because it failed to appreciate that opposing counsel would not ordinarily be too disposed to assist their adversaries out of a dilemma, and second, because the judge took that occasion to disseminate his

own divergent views on the matter to all counsel of record as well as to members of the Court. Any counsel, therefore, who supported petitioners' assertions was put in the position of thereby contradicting one of the judges. The Court had a duty to correct, in so far as possible, a record which did not reflect what had occurred in the proceedings.

III. Effect of Amended and Supplemental Pleadings.

(A) The Court of Appeals in the instant case has decided important questions of law which have not been but should be settled by this Court. Petitioners have been unable to find any decisions which answer the questions set out as III(A), III(B) and III(C) in QUESTIONS PRESENTED hereinabove. In the instant case the District Court entered an order dismissing the action on September 30, 1957. On April 17, 1958, by leave of the Circuit Court of Appeals, the petitioners filed a second amended complaint therein, alleging the existence of constitutional questions and praying, additionally, for injunctive relief. On December 1, 1958, by leave of court, petitioners filed a second supplemental complaint asserting affirmative defenses. Four defendants-appellees, by leave of court, subsequently filed answers to both the second amended complaint and the second supplemental complaint. The issues raised by these pleadings and the relief prayed for were substantially different from those before the District Court when it dismissed the action. The judgment of the District Court can have no effect on the pleadings filed after the date of the judgment. It might be argued that an amended complaint relates back to the date of the original complaint. That theory can hardly be valid when the dismissal is under the discretionary power of the court, for true discretion can

only be exercised over what is actually before the court, not over something which is only technically considered to have been before the Court. But in no event could that argument apply to a supplemental complaint and the answers thereto. There is no way, therefore, that the District Court's order can affect the pleadings filed after the date of the order. By the same token, if the District Court's order is affirmed by the Court of Appeals the judgment of the Court of Appeals can have no more effect than the order which it affirms. Nothing in the judgment of the Court of Appeals enlarges, or could enlarge, the scope of the District Court's order. All of the pleadings that were filed in the Court of Appeals remain unaffected by any judgments or orders which have been entered. They have not been dismissed or expunged from the record. Taken together they constitute a valid and subsisting cause of action now pending in the Court of Appeals. By the process of deductive reasoning this conclusion seems inescapable. *Cf. Grubbs* v. *Smith*, 86 F. 2d 275 (C. A. 6, 1936), in which the court held that an amended and substituted pleading superseded the *prior pleadings in the case. The points here involved* were urged on the Court of Appeals in oral argument and in the petition for rehearing. The Court neither answered nor commented on them. Petitioners have been unable to find any authorities in point. Since the questions here presented are important questions involving practice and procedure in the Federal Courts they should be settled by this Court.

IV. District Court's Compliance with the Mandate of the Court of Appeals.

(A) This was one of the important issues before the Court of Appeals on the appeal of the instant case since one of the possible results sought by petitioners was a remand of the case to the District Court with unequivocal directions to follow the former mandate. The Court of Appeals had ordered the District Court to hear the views of the interested parties (Appendix B, *infra*, pp. 54 and 59). The District Court refused to grant a hearing. The Court of Appeals ordered the District Court to consider and rule on the question of jurisdiction (Appendix B, *infra*, pp. 54, 58 and 59). The District Court in its order of dismissal stated that "it is not believed it is now necessary to determine the jurisdictional question" (Appendix B, *infra*, p. 61). The Court of Appeals ordered the District Court to consider and rule on the question of exercise of jurisdiction and specifically stated that the Court of Appeals had not ruled on this question (Appendix B, *infra*, pp. 54, 58 and 59). The District Court in its order of dismissal stated that "it is clearly apparent from the authorities cited and the reasoning in the Court of Appeals that if jurisdiction did exist, it should not be exercised" (Appendix B, *infra*, p. 61). These actions by the District Court seem hardly compatible with compliance with the mandate of the Court of Appeals. On the contrary, they indicate a blatant disregard for, and refusal to follow, the said mandate. In affirming the judgment of the District Court, the Court of Appeals has sanctioned and condoned a departure from the accepted and usual course of judicial proceedings to such a degree as should warrant an exercise of this Court's power of supervision.

V. Jurisdiction.

(A) The question of whether jurisdiction exists in the instant case was first raised by the Court of Appeals in its judgment of February 12, 1957, rendered on a former appeal of certain pre-trial issues (Appendix B, *infra*, pp. 53-54). Petitioners have consistently urged the existence of jurisdiction based, initially, on diversity of citizenship and, since the filing of their amended complaint, on constitutional questions as well. As pointed out hereinabove the District Court refused to decide the question of jurisdiction. The Court of Appeals in its last opinion avoids a direct decision of the issue but deals with certain other issues "assuming that jurisdiction does exist" (Appendix B, *infra*, p. 66). The question of jurisprudence, having once been raised, is too important to be left unanswered. Since the Court of Appeals did not decide that jurisdiction does not exist, petitioners will not burden this Court with a discussion in this petition of the many facets of this issue. A number of the points involved, however, will affect many other cases in the Federal Courts and should be clarified.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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June 17, 1959

APPENDIX A.

STATUTES INVOLVED.

Kentucky Revised Statutes 413.010 (2505) Action for recovery of real property; fifteen year limitation.

An action for the recovery of real property may be brought only within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims.

Kentucky Revised Statutes 413.150 (2523) Action by the Commonwealth.

The limitations prescribed in this chapter shall apply to action brought by or in the name of the Commonwealth the same as to actions by private persons, except where a different time is prescribed by statute.

62 Stat. 930, 28 U. S. C. 1331. Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

62 Stat. 930, 28 U. S. C. 1332. Diversity of citizenship; amount in controversy.

(a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The words "States", as used in this section, includes the Territories and District of Columbia.

62 Stat. 964, 28 U. S. C. 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

62 Stat. 964, 28 U. S. C. 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX B.

MEMORANDUM OPINION.

This declaratory judgment action involves the authority to execute oil and gas leases for that portion of the bed of the Ohio River that lies north of the thread of the stream. There are three groups of parties holding conflicting leases, each claiming the exclusive right to extract oil and gas from the river bed.

Plaintiffs Henry B. Walker, Jr., as successor trustee, et al., and their lessees claim the oil and gas rights by virtue of certain land patents purporting to convey title to portions of the river bed. These parties are hereinafter referred to as the Patentees.

The defendants, Henderson County, Kentucky, and its lessees, based their claim on leases from Henderson County, Kentucky. They are referred to herein as Henderson County.

Defendants, Commonwealth of Kentucky, its lessee, Ohio River Oil Company, Inc., and its assignee, Olen D. Sharp, base their claim on a lease from the State Property and Buildings Commission of the Commonwealth of Kentucky. This group of litigants is referred to herein as the Commonwealth.

As a result of a pre-trial conference, certain matters were reserved for later adjudication and the case submitted on the following three issues of law:

1. Is that part of the bed of the Ohio River lying between the thread of the stream and the northern low water line capable of appropriation under the patent procedure as outlined in KRS 56.190-56.320?

2. Does Henderson County, Kentucky, a county adjacent to the Ohio River, have authority under KRS 56.190-56.320 to lease the oil and gas lying beneath that part of the bed of the Ohio River which is between the

thread of the stream and the northern low water line thereof?

3. Does the State Property and Building Commission of the Commonwealth of Kentucky have authority under KRS 56.450-KRS 56.530, inclusive to grant a valid lease disposing of the oil and gas under that portion of the bed of the Ohio River lying between the thread of the stream and the northern low water line thereof?

It is well established that the Ohio River is within the territorial confines of Kentucky and that the northern boundary of Kentucky is the low-water mark on the north bank of the river. Handley's Lessee v. Anthony, 5 Wheaton 374, 5 L. Ed. 113 (1820); Louisville Bridge Co. v. City of Louisville, 81 Ky. 189 (1883); State of Indiana v. State of Kentucky, 136 U. S. 479, 34 L. Ed. 329 (1889).

The law is also well settled that the title to the southern half of the river bed from the middle of the river to the Kentucky shore is vested in the riparian land owners in Kentucky, and title to the bed of the Ohio River from the thread of the stream to the low-water mark on the northern shore is in the Commonwealth of Kentucky. Handley's Lessee v. Anthony; Louisville Bridge Co. v. City of Louisville; State of Indiana v. State of Kentucky (all supra); Berry v. Synder, 66 Ky. 266 (1867); Ware v. Hager, 126 Ky. 324, 103 S. W. 283 (1907); Bedford-Nugent v. Herndon, 196 Ky. 477, 244 S. W. [illegible] (1922); Willis v. Boyd, 224 Ky. 732, 7 S. W. 1108 (1928); City of Covington v. State Tax Commission, 231 Ky. 606, 21 S. W. 2d 1010 (1929); Louisville Sand and Gravel Co. v. Ralston, 266 S. W. 2d 119 (1954).

All parties to this action concede the sovereign power of Kentucky to permit the development of oil and gas deposits in the northern half of the bed of the Ohio. They differ sharply on the interpretation and construction of the various legislative acts that are advanced as authority for their development.

Memorandum Opinion

I

In their complaint the Patentees allege complete compliance with the laws of Kentucky providing for the appropriation of vacant and unappropriated lands and assert the validity of certain patents issued in 1938 to portions of the Ohio River bed north of the thread of the stream. These patents, signed by the Governor and Secretary of State and bearing the Seal of the Commonwealth of Kentucky, are filed with the record. The attack on the validity of these patents centers on the contention that the patent statutes as construed by the Court of Appeals of Kentucky apply only to uplands and do not permit the acquisition of the northern half of the Bed of the Ohio River by patent proceedings.

The question of whether or not the northern bed of the Ohio River is subject to patent was directly considered by the Court of Appeals of Kentucky in 1907 in the case of Ware v. Hager, 126 Ky. 326, 103 S. W. 283. Chapter 136 of the Act of 1893 of the Kentucky Legislature, being Sections 4702-4705 of the Kentucky Statutes, Carroll's First Edition, 1903, was the law then in effect dealing with vacant and unappropriated land. The court construed this Act of 1893 as not authorizing the acquisition of the northern bed of the river by patent. In so holding the court said:

> "While the state owns the land to the northern shore of the river, we do not think it has ever provided for the taking up of the river bed between the thread of the stream and the northern shore as vacant land. The proceeding in question was instituted under Chapter 127, Ky. St. 1903. Section 4702, which is the first section of that chapter, provides that each county in the state shall have the right to dispose of the unappropriated lands lying therein not otherwise provided for in the manner thereinafter directed. Section 4703 provides that an actual settler on any vacant or

unappropriated land shall have a pre-emption right to any number of acres, not exceeding 100. It also provides that any person who wishes to appropriate any vacant or unappropriated land may obtain an order of court authorizing him to enter and survey any number of acres, not more than 200. Section 4704 provides that the surveyor shall survey the entries in the order of time in which they made, bounding the same by plainly marked trees, stones, or stakes, and noting where they bind on a water course, or a marked line of another survey. In enacting these provisions, we cannot believe that the Legislature had in mind the taking up of the bed of the Ohio River between the thread of the stream and the northern shore. Such a survey could not be marked by stones or stakes or plainly marked trees. There could be no actual settlers on such land. While we do not doubt that the power of the Legislature to provide for the issuing of patents for the bed of the Ohio River north of the thread of the stream, so that the sand or minerals which may be on or under this land may be appropriated, we do not think it has yet done so."

This opinion has not been overruled or modified, but in 1926, the patent statutes interpreted by it were amended. However, the 1926 Amendment did not disturb Sections 4703 and 4704 which were the basis of the court's decision. Section 4703 providing that an actual settler on vacant and unappropriated land shall have a pre-emption right to 100 acres and that any person may enter and survey up to 200 acres of vacant land was re-enacted. Section 4704 providing the survey shall be marked "by plainly marked trees, stones or stakes, noting where it binds on a water course, or the marked line of another survey, giving names," was also re-enacted. The re-enactment by the legislature of a statute interpreted by the highest court of the State constitutes an adoption of the statute as con-

strued. Chatterson v. City of Louisville, 145 Ky. 485, 140 S. W. 647; Rose v. Turner, 301 Ky. 272, 191 S. W. 2d 397; Button v. Hikes, 296 Ky. 163, 176 S. W. 2d 112.

The Patentees advance the further argument that Section I (Sect. 4702) of the 1926 Amendment repudiates the Ware case by declaring for the first time that the bed of the river north of the thread of the stream was "vacant and unappropriated property," and that because of this declaration this property became subject to patent. This argument has also been answered. In Willis v. Boyd, 224 Ky. 732, 7 S. W. 2d 216 (1928), a case involving a sand and gravel lease of the north bed of the Ohio River, the 1926 Amendment was considered, and the court stated:

> "Assuming the act to be valid, it will be observed that Section 4702 does not give the counties unlimited disposition of vacant lands. But such right is to be exercised 'an a manner hereinafter directed' and while the mainland may be patented and sold in 'the manner provided' therefor and made applicable thereto, the power of the disposition of the river bed was restricted to the letting or leasing for county purposes upon such terms and conditions as to it may appear beneficial to said county."

Also see Board of Councilmen v. Pattie, 227 Ky. 343, 12 S. W. 2d 1108.

The Patentees also contend that every grant or patent of land is presumed to be valid and to have issued regularly and is prima facie evidence of title. For their authority they rely on Wallace v. Maxwell, 24 Ky. 447, and Popular Mountain Coal Co. v. Dick, 7 Ky. Op. 420. But a study of these cases discloses that the presumption that exists is only that the officers charged with issuing a patent properly perform their duties. As stated in Wallace v. Maxwell (supra), "It is admitted that the legal presumption is, that the surveyor, register, Governor and Secretary of State,

have done their duty, in regard to the several Acts necessary to be performed by them, in granting lands; and therefore surveys and patents should always be received as prima facie evidence of correctness, but further we cannot go." The patents disclose on their face that they cover part of the bed of the Ohio River, and it follows that the physicalo procedural steps required by the Statutes could not have been taken. The State cannot be bound by the unauthorized acts of its officers in issuing patents to land in disregard of the law declared in Ware v. Hager (supra). "The Commonwealth is never bound by the act of any of its officers beyond the scope of their authority." Alkin v. County Board of Education, 148 Ky. 746, 147 S. W. 920; United States Fidelity & Guaranty Co. v. Commonwealth, 31 Ky. L. Rep. 1179, 104 S. W. 1029; Leslie County v. Keith, 227 Ky. 663, 13 S. W. 2d 1012; Juett v. Town of Williamstown, 248 Ky. 235, 58 S. W. 2d 411.

On the basis of the holding in Ware v. Hager which has not been overruled or modified and which has been given legislative sanction by the re-enactment of the sections of the law upon which the decision rests, and for the other reasons given herein, the patents involved in this action are invalid.

II.

In 1953 Henderson County executed oil and gas leases to the defendants referred to herein as Henderson County. The basis of Henderson County's asserted right to make these leases is KRS 56.220 (1942) which provides as follows:

> "Lands in the Ohio River bed. All that portion of the bed of the Ohio River, lying north of the thread of the stream, except accretions to islands privately owned, is declared to be vacant and unappropriated land, and the county court of each county bordering on the Ohio River may use or lease the river bed for county purposes, upon such terms and conditions as

> to it seem beneficial to the county. Any contract of leasing made by any such county court of such river bed for any sand and gravel rights for or on behalf of the county, conveys full right and title to the lessee to the exclusive use of all sand and gravel deposits in the river bed to the extent embraced in the lease.

This statute is composed of two sentences. In the first sentence it is stated without apparent limitation that the counties "may use or lease the river bed for county purposes." In the second sentence reference is made solely to sand and gravel, and the lessees of sand and gravel rights are specifically given "full right and title" to the "exclusive use of all sand and gravel deposits in the river bed to the extent embraced in the lease."

Henderson County argues that the statute is a clear and simply worded enactment empowering the counties of Kentucky that border on the Ohio River to use or lease the northern river bed for any county purpose. And it claims that the broad grant of power contained in the first sentence of the statute authorizes leases for the extraction of oil and gas and that the second and final sentence of the Act, which mentions only leases for sand and gravel, does not limit or qualify the general grant of power given in the first division of the statute but is merely "the application of the power granted in the first sentence over a general class to a particular member of the class."

On the other hand it is the position of the Commonwealth that the right to lease granted in the first sentence is only a power to lease the surface of the river bed for a limited period and that lessees are not authorized under the general language of the first sentence to dispose of the real estate or any part thereof, such as minerals on or under the surface of the river bed. It contends that the second sentence alone permits the taking of any part of the real estate and then only in the form of sand and gravel.

Memorandum Opinion

The first issue to be decided is whether or not the meaning and legislative purpose of the Act can be determined from the words of the statute itself. If the Act is unambiguous and its meaning is clear and easily understood, the court is not authorized to go outside the language of the statute to construe it. U. S. v. Ewing, 184 U. S. 140, 46 L. Ed. 471; Barr v. Dorman, 249 Ky. 367, 60 S. W. 2d 939; Reed v. Greene, 243 S. W. 2d 892; Department of Revenue v. McIlvain, 302 Ky. 558, 195 S. W. 2d 63; Mills v. City of Barbourville, 273 Ky. 490, 117 S. W. 2d 187; City of Covington v. C. C. & R. Ry. Co., 144 Ky. 646, 139 S. W. 854. But an ambiguity may exist in a statute where the words used are definite and simple if from a consideration of the statute in its entirety doubt arises as to its scope and application. As stated in Coosaw Mining Co. v. State of South Carolina, 144 U. S. 550, 36 L. Ed. 537, 12 S. Ct. 689, "The ambiguity here referred to is not simply that arising from the meaning of particular words, but such as may arise, in respect to the general scope and meaning of a statute."

The words used in the instant statute are definite and simple, but its two sentences, one giving a seemingly unrestricted grant of power to lease and the other limiting its application to leases of sand and gravel give rise to a serious doubt as to the general scope and meaning of the statute.

This determination that the statute is ambiguous and of doubtful meaning is supported by resort to one of the rules of construction. If Henderson County's interpretation of the first sentence of the statute is accepted that it empowers the counties to make leases of all kinds, it is obvious that the second sentence of the Act is superfluous. Certainly the declaration of the Legislature contained in the second sentence authorizing the counties to execute sand and gravel leases would add nothing to the meaning of the statute if this power was already granted in the first sentence of the Act. To consider the sand and gravel sentence as superfluous, however, would be contrary to the

established rule that no provision of a statute susceptible of meaning is to be ignored. As stated in Ex Parte Public National Bank, 278 U. S. 101, "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word'. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignicant'." Citing Market Company v. Hoffman, 101 U. S. 112, 115.

Being unable to resolve the ambiguity from a consideration of the wording of the statute it is proper to refer to other canons of statutory interpretation for assistance in ascertaining the true legislative intent. Resort may be had to the history of the statute and to the acts of the General Assembly from which it was derived. May v. Clay-Gentry-Graves Tobacco Warehouse Co., 284 Ky. 502, 145 S. W. 2d 418; Thieman v. Hancock, 296 Ky. 223, 176 S. W. 2d 418; KRS 446.130. The preamble of an act may also be considered. Jones v. Paducah, 282 Ky. 628, 142 S. W. 2d 365; Nichols v. Wells, 2 Ky. 255; Beard v. Rowan, 34 U. S. 301, 9 L. Ed. 135; Louisville Memorial Gardens, Inc. v. Carpenter, 261 S. W. 2d 627.

The present land patent laws of Kentucky as found in KRS 56.190-56.240 are derived from Chapter 136 of the Acts of 1893 with the 1926 Amendment. The preamble and the emergency clause (Section 6) of the 1926 Amendment are as follows:

Preamble:

"Whereas, there are valuable sand and gravel deposits in the bed of the Ohio River north of the thread of the stream, and,

"Whereas, said sand and gravel deposits belong to the State of Kentucky and to the counties of said state

bordering on said river where said sand and gravel deposits are located, and,

"Whereas, said counties are losing the benefits of said sand and gravel deposits because of there being no law at the present time allowing said counties to lease or let said sand and gravel deposits for development;"

Emergency Clause:

"Sec. 6. Whereas, many counties in this Commonwealth are losing considerable revenue by reason of various parties' firms' and corporations' pumping and taking sand and gravel from the bed of the Ohio River, an emergency is hereby declared to exist and this Act shall take effect from and after its approval by the Governor."

Consideration of this preamble and emergency clause resolves the existing ambiguity and requires the conclusion that the true purpose of the Legislature was to restrict the power of the counties bordering on the Ohio River to the leasing of the surface of the north half of the river bed with the one named exception of leases for removal of sand and gravel deposits.

In support of this conclusion is the established law of Kentucky that a lease of minerals underlying the surface of the land, since it is a depletion lease, is treated as a sale of the real estate, and persons holding an inferior estate less than an absolute fee simple cannot execute mineral leases without express authority. Mills v. Mills, 275 Ky. 431, 121 S. W. 2d 962; Dempsey v. Diedrich, 313 Ky. 865, 232 S. W. 2d 976; Crain v. West, 191 Ky. 1, 229 S. W. 51; Foxwell v. Justice, 191 Ky. 749, 231 S. W. 509; McCoy v. Ferguson, 172 Ky. 235, 189 S. W. 191; York v. Warren Oil and Gas Co., 191 Ky. 157, 229 S. W. 114. The statute KRS 56.220 does not vest a fee simple title to the river bed in the bordering counties. It merely grants a general power

to "use or lease" and does not specifically confer authority to dispose of portions of real estate other than the express power to extract sand and gravel from the river bed. A county derives all of its power from the sovereign state and "powers not conferred are just as plainly prohibited as though expressly forbade. . . ." Bruner v. Jefferson County Fiscal Court, 239 Ky. 613, 40 S. W. 2d 271; Edwards v. Logan County, 244 Ky. 296, 50 S. W. 2d 83. It is also an admitted fact that when this statute was enacted oil and gas had not been discovered in the river bed. The existence of oil and gas deposits being unknown, it follows that the Legislature could have had no intention whatsoever one way or the other with respect to authorizing leases for its development and extraction.

For the foregoing reasons Henderson County has no authority to lease the oil and gas lying beneath that part of the bed of the Ohio River which is between the thread of the stream and the low-water mark on the northern shore.

III.

The claim of the Commonwealth is based on the lease of the river bed granted by the State Property and Buildings Commission of the Commonwealth of Kentucky. In 1949 the Kentucky Legislature enacted the State Property and Buildings Commission Act, being KRS 56.440 through 56.550. The Act creates an independent agency of the State composed of the Governor, Lieutenant Governor, Attorney General, Commissioner of Finance and the Commissioner of Revenue and gives to the Commission, among other powers, the authority:

> "56.460—(3) to purchase, lease or rent such real estate as the Commission may find to be necessary for use by the State or by any State agency, upon such terms and conditions and for such consideration as may appear to the Commission to be fair and reasonable.

"(4) To sell and convey any real estate owned by the State or by any State agency, found by the Commission not to be needed for public use or to have become unsuitable for such use, except that this power shall not extend to real estate as to which a particular State Agency has the power, as recognized in Subsection (2) of KRS 56.500, to sell or convey with the approval of the Commission.

"(7) To lease any real estate or any part thereof, now owned or hereafter acquired by the State or by any State agency, to any person not a State agency, when the Commission finds as a matter of fact that the real estate or any part thereof is not needed for State purposes, except that this power shall not extend to any real estate as to which a particular State agency has power, as recognized in Subsection (2) of KRS 56.500, to lease with the approval of the Commission. Any such lease shall be upon such terms and conditions and for such consideration as the Commission may prescribe, and shall be made in the name of the Commonwealth of Kentucky, and shall be signed by the Chairman of the Commission and lodged for record in the office of the Secretary of State."

By this enactment the Legislature has placed in the hands of this Commission complete power of disposal over the lands owned by the State "found by the Commission not to be needed for public use", with the exceptions contained in Subsection (2) of KRS 56.500 which are not applicable here. The statute grants broad powers, but it is not arbitrary and its constitutionality has been upheld. Preston v. Clements, Governor, 313 Ky. 479, 232 S. W. 2d 85.

The argument is advanced that this is only a housekeeping agency and that it does not purport to deal with "vacant and unappropriated lands". In support of this argument the Governor's opening and closing remarks to the 1945 session of the Legislature are quoted and the

history of the Act is explored, but the language of this statute, unlike that of KRS 56.220, is clear and unambiguous and it must be applied and not interpreted. (See cases cited in Part II hereof.)

It is also contended that the public policy of the State requires that the proceeds from the sale of vacant and unappropriated lands should go to the counties and not to the State Treasury, since from 1835 the Acts of the General Assembly have provided that the proceeds of "vacant and unappropriated lands" be used for county purposes. It has been decided herein (Section 1) that the unappropriated land in the Ohio River bed north of the thread of the stream is not subject to acquisition by patent. In any event the public policy of the State is determined by its constitution and statutes and is what the Legislature announces it to be as long as it is not contrary to constitutional provisions. Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487; Gathright v. Byllesby and Co., 154 Ky. 106, 157 S. W. 45. It is for the Legislature to say whether proceeds from the sale of the natural resources of Kentucky shall be for the benefit of the State at large or for particular sub-divisions of the Commonwealth.

The language of the Statute is clear and unambiguous. It authorizes the Commission to lease and sell real property owned by the State, and the power to sell real property includes the power to execute oil and gas leases. Ilari v. Ewing, 314 Ky. 182, 234 S. W. 2d 293; Sammons v. Warfield Natural Gas Co., 304 Ky. 548, 201 S. W. 2d 719.

For the stated reasons, the State Property and Buildings Commission of the Commonwealth of Kentucky has authority to grant a valid lease disposing of the oil and gas under that portion of the bed of the Ohio River lying north of the thread of the stream.

Counsel for the Commonwealth will submit appropriate order on notice.

Henry L. Brooks,
United States District Judge.

December 16, 1955.

ORDER AND JUDGMENT.

This declaratory judgment action filed under 28 U.S.C.A. 2201 having been submitted to the court upon certain issues at law set forth in a pre-trial order drawn pursuant to Rules 16 and 54(b) of the Rules of Civil Procedure, and the court having received briefs and heard oral arguments of counsel and having rendered and filed an opinion herein, Now, Therefore, it is ordered and adjudged as follows:

I. The State Property and Buildings Commission of the Commonwealth of Kentucky had the power and authority under KRS 56.540 to KRS 56.550 inclusive, to lease for oil and gas purposes the vacant and unappropriated lands in the bed of the Ohio River between the thread of the stream and the northern low water line thereof.

II. Henderson County, Ky., a county adjacent to the Ohio River, did not have the power or authority under KRS 56.190 to 56.320, or otherwise, to lease for oil and gas purposes the vacant and unappropriated lands in the bed of the Ohio River between the thread of the stream and the northern low water line thereof, and the oil and gas leases which it executed to Felmont Oil Corporation and to Ben M. Strother, as described in the pleadings, are void.

III. The vacant and unappropriated land in the bed of the Ohio River lying between the thread of the stream and the northern low water line is not subject to appropriation under the patent procedure outlined in KRS 56.190 to KRS 56.320 inclusive, and the patents described in paragraphs 4 and 5 of the complaint as amended are void.

IV. This judgment is limited to the law issues adjudged in the preceding three paragraphs and all other issues in this case are reserved for further decision of the court, such reserved issues being separate claims within the meaning of Rule 54(b) of the Rules of Civil Procedure.

V. The claims and rights herein adjudged are separate and apart from the claims and rights reserved in para-

graph IV hereof within the meaning of Rule 54(b) of the Rules of Civil Procedure, pursuant to said Rule, the court directs the entry of a final judgment upon the claims adjudged in paragraphs I, II and III hereof, being one or more, but less than all, of the separate claims in this action, the court having expressly determined there is no just reason for delay pending a decision on the reversed claims; and this order shall be considered a final judgment upon the issues adjudged in Paragraphs I, II and III.

Henry L. Brooks,
United States District Judge.

January 13, 1956.

(Filed Feb. 12, 1957)

Nos. 12839-8

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Henry B. Walker, Jr., Trustee, et al., - Appellants,

v. No. 12,839

Felmont Oil Corporation, et al., - - - Appellees.

Decided February 12, 1957.

Before: Allen, Miller and Stewart, Circuit Judges.

Miller, Circuit Judge. This declaratory judgment action was filed in the District Court by the plaintiffs-appellants under the provisions of Section 2201, Title 28, U. S. Code, seeking an adjudication of the rights of the plaintiffs as against the defendants therein in certain portions of the bed of the Ohio River that lie north of the thread of the stream, opposite the Kentucky shore.

The controversy arises by reason of the unusual situation respecting the legal title to the bed of the Ohio River adjacent to the Kentucky shore. It is well established that the Ohio River is within the territorial confines of Kentucky and that the northern boundary of Kentucky is the low-water mark on the north bank of the river. It is also well settled that title to the southern half of the river bed, from the thread of the stream to the Kentucky shore, is in the riparian land owners in Kentucky, and that title to the northern portion of the river bed, from the thread of the stream to the low water mark on the northern shore is in the Commonwealth of Kentucky. Handly's Lessee v. Anthony, 5 Wheaton 374; Louisville Bridge Co. v. City of

Louisville, 81 Ky. 189; Indiana v. Kentucky, 136 U. S. 479; Ware v. Hager, 126 Ky. 324; Willis v. Boyd, 224 Ky. 732; City of Covington v. State Tax Commission, 231 Ky. 606. The specific controversy is the conflicting claims of the plaintiffs and the defendants to the oil and gas rights in the bed of the Ohio River between the thread of the stream and the low-water mark on the northern shore opposite the Kentucky shore.

The plaintiffs, Henry B. Walker, Jr., Trustee, and others, claim the oil and gas rights by virtue of certain land patents from the Commonwealth of Kentucky in the year 1939 following proceedings in the Henderson County Court of Kentucky for that purpose. The defendants, Henderson County, Kentucky and its lessees, Felmont Oil Corporation and Ben M. Strother, who has assigned his interest in the lease to The Carter Oil Company, claim the oil and gas rights by virtue of leases from Henderson County on October 19, 1953 and December 31, 1953. The defendants, Ohio River Oil Company and its assignee, Olen Sharp, claim the oil and gas rights by virtue of a lease on August 7, 1952, from the State Property and Buildings Commission to the Ohio River Oil Company, which purported to lease such portion of the river bed extending 150 miles in length, opposite the Kentucky shore. Following responsive pleadings, motions to dismiss and a pre-trial conference, a pre-trial order was entered providing that the motions to dismiss, together with documents and affidavits filed in support thereof, be treated as motions for summary judgment, that certain issues be reserved for later trial and judgment, and that the following issues be tried on briefs and oral arguments:

I.

> Does the State Property & Buildings Commission of the Commonwealth of Kentucky have authority under KRS 56.450-KRS 58.550 inclusive to grant a valid lease disposing of the oil and gas under that

portion of the bed of the Ohio River lying between the thread of the stream and the northern low-water line thereof?

II.

Does Henderson County, Kentucky, a County adjacent to the Ohio River, have authority under KRS 56.190-56.320 to lease the oil and gas lying beneath that part of the bed of the Ohio River which is between the thread of the stream and the northern low-water line thereof?

III.

Is that part of the bed of the Ohio River lying between the thread of the stream and the northern low-water line capable of appropriation under the patent procedure as outlined in KRS 56.190-56.320?

The District Judge, in a Memorandum Opinion supporting his ruling, held against the plaintiffs, Henry B. Walker, Jr., Trustee, and others claiming patent rights from the Commonwealth, and also against Henderson County, Kentucky and those parties holding leases therefrom, and in favor of the State Property and Buildings Commission and those parties holding leases from it. An order and judgment to that effect was entered, which also provide it should be treated as the entry of a final judgment upon the claims adjudged within the meaning of Rule 54(b) of the Rules of Civil Procedure. Separate appeals were thereafter taken by the plaintiffs, Henry B. Walker, Jr., Trustee, and others, and by the defendants, Felmont Oil Corporation, The Carter Oil Company, and Henderson County. The appeals have been heard together by this court.

The Memorandum of the District Judge, which is reported at Walker v. Felmont Oil Corp., 136 F. Supp. 584, contains a clear statement and analysis of the conflicting claims, together with the reasoning of the District Judge

and citation of the applicable authorities upon which he relied, to which reference is made, making it unnecessary to review it here in detail.

Before reaching the merits, the question of jurisdiction over the defendant, the State Property and Buildings Commission, by reason of the 11th Amendment of the U. S. Constitution, is presented. The Amendment provides that the judicial power of the United States shall not be construed to extend to any suit against one of the United States by citizens of another state. Apparently, this question was not urged upon the District Judge by any of the parties and no specific ruling on it was made by him. The question is not referred to in the briefs on this appeal. However, the issue was made by the motions of the Commonwealth of Kentucky and the Commission to dismiss the complaint as amended for failure to state a claim upon which relief could be granted. Great Northern Life Ins. Co. v. Read, 322 U. S. 47, 49. See also Mitchell v. Maurer, 293 U. S. 237, 244. The present action, although directed against the Commission, actually seeks to take from the Commonwealth of Kentucky certain oil and gas royalties under a contract executed by the Commission, and in substance might properly be considered as one against the Commonwealth. Any judgment in this case will affect the interest and property rights of the Commonwealth, not those of the Commissioners. Kennecott Copper Corp. v. State Tax Commission, 327 U. S. 573, 577; Kentucky State Park Commission v. Wilder, 256 Ky. 313, 315; Lehman v. Williams, 301 Ky. 729, 730; Louisiana Land and Exploration Co. v. State Mineral Board, 229 F. 2d 5, C. A. 5th, cert. denied 351 U. S. 965. Compare: Kentucky State Park Commission v. Wilder, 260 Ky. 190; Watkins v. Department of Highways, 290 S. W. 2d 28 (Ky.). The Commonwealth's immunity from suit is not waived by the mere filing of pleadings by the Commission and by its agreeing to a trial on the merits. Sect. 231, Constitution of Kentucky, provides that the General Assembly may, by law, direct in what

manner and in what courts suits may be brought against the Commonwealth. Real doubt exists whether the General Assembly of Kentucky has consented to the prosecution of a suit of this nature against it in the Federal Courts. Sections 56.450, 12.010 (2) and (7), 15.020. Great Northern Life Ins. Co. v. Read, supra, 322 U. S. 47, 54; Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U. S. 459, 466-469; Kennecott Copper Corp. v. State Tax Commission, supra, 327 U. S. 573, 578-579.

There is in addition the question whether diversity of citizenship exists in this case between the plaintiffs and the Commission. State Highway Commission v. Utah Construction Co., 278 U. S. 194, 199-200; O'Neill v. Early, 208 F. 2d 286, 289, C. A. 4th; Lowe v. Manhattan Beach City School District, 222 F. 2d 258, 259, C. A. 9th.

Apparently, the parties to this action were in agreement in having the issues adjudicated by the federal court instead of the state court. But jurisdiction cannot be conferred by agreement of the parties. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 167. The jurisdictional question must be decided before the case is considered on its merits. In view of the failure of the parties to present their views to the court on this issue and in order to enable them to do so in a matter involving a difficult question under Kentucky law, and to have the benefit of a ruling by the District Judge, this case should be returned to the District Court for that purpose. Edward G. Budd Manufacturing Co. v. N. L. R. B., 332 U. S. 840; Mitchell v. United States, 348 U. S. 905.

There is another question in this case which was not raised by the parties, but which is so closely connected with the question of jurisdiction that it should also be considered by the District Judge.

Although jurisdiction may exist, it does not follow that it must be exercised. The Declaratory Judgment Act confers a discretion on the court rather than an absolute right

upon the litigant. Public Service Commission of Utah v. Wycoff Co., 344 U. S. 237, 241, 243; Brillhart v. Excess Insurance Co., 316 U. S. 491, 494; Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293. Federal courts should exercise their discretionary power with the proper regard for the rightful independence of state governments in carrying out their domestic policy. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of lower federal courts. Pennsylvania v. Williams, 294 U. S. 176, 185; Burford v. Sun Oil Co., 319 U. S. 315, 318, 334. A federal court in a declaratory judgment suit should give strong consideration to the public interest involved in the avoidance of needless friction with state policies. Railroad Commission of Texas v. Pullman Co., 312 U. S. 496, 500; Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341, 350.

This action involves (1) the construction of former Sections 4702, 4703 and 4704, Carroll's Kentucky Statutes, dealing with vacant and unappropriated land in Kentucky, and (2) the construction of Sections 56.440-56.990, Kentucky Revised Statutes, enacted in 1949, creating the State Property and Buildings Commission. They are purely questions of state law, which the federal court must ascertain and apply. Erie Railroad Co. v. Tompkins, 304 U. S. 64.

With respect to the claims of the patentees under the statutes in the first group, appellees rely principally upon Ware v. Hager, 126 Ky. 324, and Willis v. Boyd, supra, 224 Ky. 732. Appellants vigorously attack the correctness of the ruling in Ware v. Hager, contending that it ignored and failed to follow prior rulings of the same court. They contend that the 1926 amendment of the statute was for the purpose of correcting the mistake. This contention has merit. Willis v. Boyd, supra, was decided after the amendment, but did not involve the same issue. However, in disposing of the case the opinion, without considering the effect of the 1926 amendment, apparently expressed the

same opinion as the Court had expressed in Ware v. Hager. Appellants contend that the ruling relied on is dictum, is clearly erroneous, not binding on the federal court, and should not be followed. There is no other ruling by the Kentucky Court of Appeals, that State's court of last resort, on this particular issue. Kentucky has no intermediate appellate court. Dictum from the state court of last resort is not binding upon the District Court in a diversity of citizenship action. Copper S. S. Co. v. State of Michigan, 194 F. 2d 465, 468, C. A. 6th. In view of the criticism directed against it, it is questionable what weight it has as "available data" in attempting to determine what the state law is. West v. American Telephone & Telegraph Co., 311 U. S. 223, 227.

A conflict between the state and federal rulings on a purely local matter is probable. It appears that such a conflict may already exist through a ruling of the Henderson Circuit Court, a trial court of general jurisdiction in Henderson County, Kentucky. Although this ruling was not binding upon the federal court, King v. Order of Travelers, 333 U. S. 153, it indicates the conflict which is in the making between the state and federal courts. This Court has experienced difficulty in a matter of this kind heretofore. Doggrell v. Great Southern Box Co., 206 F. 2d 671, rehearing granted, 208 F. 2d 310, C. A. 6th. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." Railroad Commission of Texas v. Pullman Co., supra, 312 U. S. 496, 500; Brillhart v. Excess Insurance Co., supra, 316 U. S. 491, 497.

With respect to the claims of Henderson County and its lessees, we have the following situation. Kentucky counties, other than Henderson lie on the southern shore of the Ohio River along the 150 miles in length covered by the appellees' lease. The conflicting claims of such counties, the Commonwealth of Kentucky, and possible patentees, in the bed of the Ohio River adjacent to such

counties, if litigated in the courts of Kentucky, will not be determined by any ruling in this case. Henderson County and its lessees rely upon Willis v. Boyd, supra, and Board of Councilmen v. Pattie, 227 Ky. 343, but we think the statements in those opinions are dicta with little or no bearing upon the issue here in question. The particular portion of the statute which is the center of the controversy in this case was not referred to in the Pattie case, and was not discussed in either of the two cases. There is no direct ruling by the Kentucky Court of Appeals on this question. No matter how seasoned the judgment of the District Judge may be, it cannot escape being a forecast rather than a determination. Railroad Commission of Texas v. Pullman Co., supra, 312 U. S. 496, 499-500. Uniformity throughout the State with respect to this important question of property rights is not promoted by the exercise of federal jurisdiction in this case.

With respect to the statutes creating the State Property and Buildings Commission, its constitutionality was upheld in Preston v. Clements, Governor, 313 Ky. 479. There is a sharp difference of view between the parties as to whether it is applicable to the natural resources in land owned by the State. There is no ruling by the Court of Appeals of Kentucky to guide the District Judge in construing this statute. Its construction involves the policy of the Commonwealth in its handling of its natural resources.

Whether the rights of the parties can be adequately protected by proceedings in the state courts, whether there is any need for the intervention of a federal court to protect such rights, and the public interests which are involved in the possible conflict between federal and state court rulings as referred to above, are questions which should have the District Judge's careful consideration in connection with the jurisdictional issue involved on the remand. In addition to the cases referred to above, see: Williams v. Dalton, 231 F. 2d 646, 648, C. A. 6th; Spector Motor Service, Inc.

v. McLaughlin, 323 U. S. 101, 104-105; Shipman v. Dupree, 339 U. S. 321; A. F. of L. v. Watson, 327 U. S. 582, 591, 598-599; Stefanelli v. Minard, 342 U. S. 117.

The judgment of the District Court is vacated and the case remanded for further proceedings in accordance with the views expressed herein.

ORDER—Filed June 25, 1957.

Before: Allen, Miller and Stewart, Circuit Judges.

Appellants, Henry B. Walker, Jr., Trustee, et al., appellee, Ohio River Oil Company, Inc., and the Commonwealth of Kentucky have filed separate petitions for rehearing which thoroughly and ably present to this court their contentions that jurisdiction of this action and of the parties thereto existed in the United States District Court and that it was not error for the District Court to exercise that jurisdiction.

Although the petitioners are in accord on most of the question involved and in the relief requested, there is a sharp difference between them on one of the important questions involved. The Commonwealth of Kentucky disagrees with the contention of the other petitioners that it is not an indispensable party to this action. It states that it cannot agree that the state's title to its natural resources should be decided in a case in which the Commonwealth of Kentucky is not a party and objects to being dismissed as a party. Recognizing the argument of the other petitioners that the Commonwealth of Kentucky was not made a party to the action but intervened therein, nevertheless, its presence in the case may have an important effect upon the jurisdictional question, Kentucky Natural Gas Corporation v. Duggins, 165 F. 2d 1011, 1015, C. A. 6th. This question has not been considered by the District Court, nor are

we making a ruling on it in disposing of the present petitions for rehearing.

This Court, in vacating the judgment of the District Court, did not rule upon the issues now presented by the petitioners, but remanded the case to the District Court for consideration of, and its ruling on, the question of jurisdiction and its exercise thereof. We pointed out that before such a ruling is made the interested parties should present their views to the District Court, where the ruling would be made. The arguments contained in the pending petitions for rehearing are properly addressed to the District Court rather than to this Court. In considering them, the District Court will exercise its own judgment in the matter, recognizing that in handing down the opinion in this case we had not presented to us petitioners' contentions and arguments in support of the existence and exercise of federal jurisdiction, and we were presenting and explaining the different aspects of the problems involved in the District Court rather than deciding them.

The petitions for rehearing are accordingly denied.

Approved for entry:

(s) Shackelford Miller, Jr.,
United States Circuit Judge.

Received July 5, 1957
Filed July 8, 1957

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Western District of Kentucky

GREETING:

Whereas, lately in the United States District Court for the Western District of Kentucky, before you or some of you, in a cause between Henry B. Walker, Jr., Trustee, et al., Plaintiffs, and Felmont Oil Corporation, et al., Defendants (D. C. No. 600 Civil), an order and judgment was entered on the 13th day of January, 1956;

And Whereas, the said Henry B. Walker, Jr., Trustee, et al., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears;

And Whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-six, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded to the District Court for further proceedings in accordance with the views expressed in the opinion herein.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the third day of July, in the year of our Lord one thousand nine hundred and fifty-seven.

(s) Carl W. Reuss,
Clerk, United States Court of Appeals
for the Sixth Circuit.

(Seal)
(Costs—To be recovered by appellants)
Clerk—$25.00

ORDER OF THE DISTRICT COURT.

The judgment in this case has been vacated and the case remanded for further proceedings in accordance with the opinion of the United States Court of Appeals, 240 F. 2d 912. Since remand, a complaint has been filed in the Henderson County Circuit Court raising the same questions presented in this suit from which an appeal may be prosecuted to the Kentucky Court of Appeals, and a motion has been made to stay proceedings here pending the final judgment of the state courts.

The Court of Appeals remanded this case for consideration of the questions of the existence of federal jurisdiction and the validity of exercising such jurisdiction if it were found to exist. Neither of these questions has heretofore been raised in this court, and it is not believed it is now necessary to determine the jurisdictional question, and it is clearly apparent from the authorities cited and the reasoning of the Court of Appeals that if jurisdiction did exist, it should not be exercised. This case does involve difficult questions requiring interpretation of state laws that effect the public policy of Kentucky, and since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings that could lead to a possible conflict between state and federal rulings.

There is also no valid purpose to be served by retaining this case on the docket of this court.

It Is Therefore Ordered that this action be and it is dismissed with prejudice as to the issues determined herein and without prejudice to such other issues as are raised by the pleadings but not adjudicated. The parties shall be taxed their respective costs.

(s) Henry L. Brooks,
United States District Judge.

September 30, 1957.

ORDER OF THE DISTRICT COURT.

It appearing that the order entered herein on September 30, 1957, removing this case from the docket of this court may be ambiguous, said order is now modified to read as follows:

It Is Ordered that this action be and it is hereby dismissed without prejudice. The parties shall be taxed their respective costs.

(s) Henry L. Brooks,
United States District Judge.

October 2, 1957.

(Filed December 18, 1958)

No. 13,491

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Henry B. Walker, Jr., Trustee, Et Al.,
Appellants,
v.
Felmont Oil Corporation, Et Al.,
Appellees.

Appeal from the United States District Court for the Western District of Kentucky.

Decided December 18, 1958.

Before: Allen, Chief Judge, Martin and Miller, Circuit Judges.

Miller, Circuit Judge. On the former appeal of this case it appeared that the question of the District Court's jurisdiction had not been raised in the District Court or expressly passed upon by the District Judge. This Court had substantial doubt about the existence of jurisdiction. It also appeared that a decision in the case depended upon a construction of certain Kentucky Statutes affecting the public policy of Kentucky, which had not yet been made by the Court of Appeals of Kentucky, that state's court of last resort. In view of numerous decisions of the United States Supreme Court, referred to in the opinion of this Court, this Court thought it advisable that the District Judge consider whether, in a declaratory judgment action of this nature involving such issues, the District Court should exercise jurisdiction if it existed. We, accordingly, vacated the judgment of the District Court and remanded the action for the purpose of having the District

Judge consider the question of jurisdiction and the exercise thereof before reviewing the case on its merits. Walker v. Felmont Oil Corp., 240 F. 2d 912, C. A. 6th.

Following the remand, the District Judge gave consideration to the question of jurisdiction and its exercise by the District Court. In the meantime, a complaint had been filed in the Henderson County Circuit Court of Kentucky, which, in the opinion of the District Judge, raised the same legal questions presented in this action, by reason of which a ruling decisive of the rights of the parties in this action would, in the normal course of that case, be made by the Court of Appeals of Kentucky.

On September 30, 1957, the District Judge entered an order reading in part as follows:

> "The Court of Appeals remanded this case for consideration of the questions of the existence of federal jurisdiction and the validity of exercising such jurisdiction if it were found to exist. Neither of these questions has heretofore been raised in this court, and it is not believed it is now necessary to determine the jurisdictional question, and it is clearly apparent from the authorities cited and the reasoning of the Court of Appeals that if jurisdiction did exist, it should not be exercised. This case does involve difficult questions requiring interpretation of state laws that effect the public policy of Kentucky, and since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings that could lead to a possible conflict between state and federal rulings.
>
> "There is also no valid purpose to be served by retaining this case on the docket of this court."

The order, as subsequently amended, also dismissed the action without prejudice, from which ruling the present appeal was taken.

Appellants vigorously contend that jurisdiction exists in the District Court. Following the dismissal of the action in the District Court, appellants tendered for filing in this Court an amended complaint which alleged that the acts of the Kentucky State Property and Building Commission and the Commonwealth of Kentucky deprived them of their property without due process of law and impaired the obligations of their patent contracts, thus attempting to inject into the case as a basis of jurisdiction the new issue of a constitutional question. Sec. 1331, Title 28, U. S. Code. We permitted the amendment to be filed over objections of opposing parties, under the provisions of Sec. 1653, Title 28, U. S. Code, which provides that defective allegations of jurisdiction may be amended in the appellate court. Appellees have denied that a constitutional question exists. In any event, this involves only the question of jurisdiction, and since the ruling of the District Judge is not affected by the existence of jurisdiction, if it does exist, the amendment is immaterial in our present review of the case.

Appellants have also tendered on the day of the oral argument of this appeal another so-called "Supplemental Complaint", which alleges that the period of time within which an action must be brought in Kentucky for the recovery of real estate is fifteen years under Sec. 413.010, Kentucky Revised Statutes, that with respect to the patents heretofore issued to them by the Commonwealth of Kentucky said period of time expired July 26, 1954, and that no action was brought by any of the parties contesting appellants' claims in this action prior to the expiration of the Statute of Limitations. Appellants' reliance upon Rule 15 (d), Rules of Civil Procedure, for the right to file this supplemental complaint is misplaced. The Rules govern the procedure in the District Courts, not the Court of Appeals. Rule 1, Rules of Civil Procedure; Hines v. Royal Indemnity Co., 253 F. 2d 111, 113, C. A. 6th. The taking of the appeal divested the District Court of juris-

diction of the case, transferring it to the Court of Appeals. Thompson v. Harry C. Erb, Inc., 240 F. 2d 452, 454, C. A. 3rd. A new issue, not raised by the pleadings in the District Court or considered by it, can not be raised for the first time on appeal. Bergeron v. Mansour, 152 F. 2d 27, 31, C. A. 1st; United States v. Newbury Mfg. Co., 123 F. 2d 453, C. A. 1st; Jones v. Kennedy, 2 F. R. D. 357, D. C., D. C. See also: Gutensohn v. Kansas City Southern Ry. Co., 140 F. 2d 950, 952, C. A. 8th. The motion to file the Supplemental Complaint will be overruled. In any event, it merely presents another question affecting the merits of the case, which becomes immaterial when the District Court declines to exercise jurisdiction.

The issue before us, assuming that jurisdiction does exist, is whether the District Judge was in error in declining to exercise it. Under the authorities cited in Walker v. Felmont Oil Corp., supra, 240 F. 2d 912, 916, C. A. 6th, it is a matter of discretion on the part of the District Judge in a declaratory judgment action of this kind whether jurisdiction should be exercised or declined. In our opinion, there was no abuse of such discretion on the part of the District Judge in entering the order hereinabove referred to, from which this appeal was taken.

There remains to be considered whether the District Judge should have dismissed this action without prejudice, as was done, or should have merely stayed proceedings until final disposition of the state court action and thereafter entered a final judgment in accordance with the construction given by the Court of Appeals of Kentucky to the statutes involved. The dismissal of the action offers an opportunity to the appellants to seek a review by the Supreme Court of the rulings of the District Court and of this Court. This aspect of the case was called to the attention of counsel for appellants at the oral argument of this appeal. Of the two alternatives suggested, he expressed a preference for the order of dismissal without prejudice.

The judgment of the District Court is affirmed.

JUDGMENT—Filed December 18, 1958.

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING—Filed January 22, 1959.

Appellants' petition for rehearing having been considered by the Court;

It Is Ordered that said petition be denied.

APPENDIX C.

DOCKET ENTRIES IN DISTRICT COURT.

July 16, 1954	Complaint for Declaratory Judgment filed. Summons issued. Entry of Appearance of Ohio River Oil Co., Inc. filed.
July 19, 1954	Answer and Cross-Complaint of Ohio River Oil Co. filed. Summons issued for service on Cross-Complaint.
July 20, 1954	Summons executed as to service on Complaint and Cross-Complaint.
Aug. 5, 1954	Answer and Disclaimer of Ben M. Strother filed.
Aug. 21, 1954	Amended Complaint for Declaratory Judgment filed.
Aug. 23, 1954	Summons issued for additional parties defendant, Kentucky State Property & Buildings Commission and County of Henderson.
Aug. 25, 1954	Summons executed as to Kentucky State Property and Buildings Commission.
Aug. 26, 1954	Summons executed as to County of Henderson.
Oct. 16, 1954	Amended Answer and Cross-Complaint of Ohio River Oil Co., Inc. filed.
Oct. 27, 1954	Answer and Cross-Complaint of the Commonwealth of Ky. ex rel. State Property and Buildings Commission filed.
Nov. 5, 1954	Motion of Carter Oil Co. to dismiss Cross-Complaint as amended of Ohio River Oil Co. filed; Motion of Felmont Oil Corporation to dismiss Cross-Complaint as amended of Ohio River Oil Co. filed; Motion of Felmont Oil Company to dismiss Cross-Complaint of Commonwealth of Kentucky ex rel., etc. filed.

Docket Entries in District Court

Nov. 15, 1954	Motion of Henderson County, Ky. to dismiss the complaint as amended filed; Motion of Henderson County to dismiss Cross-Complaint as amended of Ohio River Oil Company, Inc. filed; Motion of Henderson County to dismiss the cross-complaint of the Commonwealth of Ky., ex rel., etc. filed.
Dec. 6, 1954	Answer of Henderson County to (a) Complaint as amended; (b) Cross-Complaint as amended of Ohio River Oil Co.; (c) Cross-Complaint of Commonwealth of Ky. ex rel., etc.; (d) Cross-Complaint against Felmont Oil Corporation and the Carter Oil Company; filed.
Jan. 5, 1955	Motion for permission to file supplemental Complaint filed.
Jan. 10, 1955	Order filing Supplemental Complaint making Olen Sharp Defendant and requiring non-resident defendant to answer within 30 days after service.
Jan. 17, 1955	Order setting pre-trial conference at Owensboro, January 24, 1955.
Jan. 24, 1955	Order for service on non-resident defendant returned and filed. Executed January 14, 1955.
Jan. 24, 1955	Answer and Cross-Claim of Olen Sharp filed.
Jan. 24, 1955	Motion of Commonwealth of Kentucky, ex rel. J. D. Buckman, Jr., Attorney General of Kentucky, to intervene as a Defendant and Cross-Claimant filed.
Jan. 24, 1955	List of issues to be tried on briefs and oral argument filed. Issues of fact to be tried before the Court filed. Suggested agenda for pre-trial conference filed.
Jan. 24, 1955	Pre-trial conference. Attorneys to write order after transcript of hearing is filed.

Docket Entries in District Court

Feb. 1, 1955	Stipulation as to Motion of Kentucky, etc. filed.
Feb. 9, 1955	Motion of Commonwealth of Kentucky, et al. to dismiss the Complaint as amended and the answer and cross-complaint of Henderson County filed.
Feb. 11, 1955	Amendment to Amended Complaint filed to correct description of Diamond Island filed.
Feb. 28, 1955	Agreed Order in re motions and pleadings filed by Commonwealth of Kentucky ex rel. J. D. Buckman, Attorney General.
Mar. 2, 1955	Motion of plaintiffs for extension of time to file brief filed. Motion for Commonwealth of Kentucky to furnish copy of described opinion of Attorney General "tendered". Order.
Mar. 8, 1955	Pre-trial Conference Order.
Mar. 11, 1955	Response of Commonwealth of Kentucky to Motion for Opinion of Attorney General filed.
Mar. 11, 1955	Order extending time for defendants to file briefs extended to and including April 15, 1955.
Apr. 15, 1955	Motion for extension of time to file brief filed by Ohio River Oil Compony, et al. Sustained.
May 2, 1955	Motion of Plaintiff's for extension of time to file brief filed.
May 2, 1955	Order extending time for filing brief to May 20, 1955.
May 24, 1955	Order setting case for oral argument at Louisville, July 8, 1955.
June 21, 1955	Motion of various Counties to file briefs filed.
June 24, 1955	Order postponing oral arguments until further order of the Court.

Docket Entries in District Court

July 7, 1955	Order granting leave to various Counties to file brief.
July 21, 1955	Order setting case for oral argument at Louisville on Friday, August 10, 1955.
July 27, 1955	Order re-setting case for argument on September 16, 1955 at Owensboro.
Sept. 20, 1955	Oral arguments at Owensboro—Order.
Dec. 16, 1955	Memorandum filed.
Dec. 29, 1955	Notice of Judgment to be submitted Jan. 13, 1956 filed by Ohio River Oil Co.
Jan. 9, 1956	Motion to substitute party; Proof of Service and Notice filed. Order sustaining motion.
Jan. 9, 1956	Notice of Judgment to be submitted by Carter Oil Company and Felmont Oil Corporation on Jan. 13, 1956, filed.
Jan. 13, 1956	Order and Judgment.
Feb. 7, 1956	Notice of Appeal filed; Bond for costs filed; by Felmont Oil Corporation, Carter Oil Company, and Henderson County; Attorneys of record mailed copies by the Deputy Clerk.
Feb. 10, 1956	Notice of Appeal, Bond for costs filed by Plaintiffs. Attorneys of record mailed copies by the Deputy Clerk.
Mar. 13, 1956	Record mailed Court of Appeals.
Mar. 14, 1956	Record docketed in Court of Appeals.
July 5, 1957	Opinion filed.
July 8, 1957	Orders filing mandate (2).
Sept. 5, 1957	Motion of Henderson County to stay proceedings.
Sept. 9, 1957	Response in Opposition to Motion for Stay of Proceedings.
Sept. 11, 1957	Hearing on Motion for Abatement; Response of Ohio River Oil Company filed; Response of plaintiffs to motion filed; Order from Court of Appeals denying rehearing; Briefs on rehearing in Court of Appeals

	filed (by agreement to be submitted on an order of September 11).
Sept. 16, 1957	Order filed as of September 11 (copies sent to attorneys).
Sept. 30, 1957	Order dismissing.
Oct. 1, 1957	Copies mailed to each attorney.
Oct. 2, 1957	Order amending the order of September 30; Dismissed without prejudice.
Oct. 31, 1957	Notice of appeal filed by plaintiffs; Bond filed; copies mailed to attorneys of record.
Dec. 6, 1957	Motion for Extension of Time to File Record on Appeal.
Dec. 9, 1957	Order Extending Time to File the Record to January 29, 1958.
Jan. 24, 1958	Record mailed to United States Court of Appeals (by express); copy of certificate mailed Mr. Walker on that date.
Jan. 27, 1958	Copies of certificate mailed to attorneys of record.
Jan. 29, 1958	Received certified copy of motion of Mr. Walker for denying order to show cause and affidavit for Writ of Mandamus.
Jan. 29, 1958	Record received and docketed in Court of Appeals, No. 13,491.

CAPTION FROM ORIGINAL COMPLAINT SHOWING PARTIES.

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Henry B. Walker, Jr., as Successor Trustee under a certain Deed of Trust dated the 25th day of March, 1940, executed by Frank Schwegman, et al.

v.

Felmont Oil Corporation,
Ben M. Strother,
Ohio River Oil Company, Inc.

No. 600

CAPTION FROM AMENDED COMPLAINT SHOWING PARTIES.

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Henry B. Walker, Jr., as Successor Trustee under a certain Deed of Trust dated the 25th day of March, 1940, executed by Frank Schwegman, et al.,
John H. Bower,
James C. Bower,
Henry B. Walker,

v.

Felmont Oil Corporation,
Ben M. Strother,
Ohio River Oil Company, Inc.,
The Carter Oil Company,
The Kentucky State Property and Buildings Commission,
Henderson County, Kentucky.

No. 600

DOCKET ENTRIES IN COURT OF APPEALS.

1958		
Jan.	29	Certified record (3 vols. pleadings) filed, and cause docketed.
Feb.	6	Appearance of counsel for appellee, Carter Oil Company.
"	7	Appearance of counsel for appellants.
"	7	Statement of contents of appellants' appendix.
"	25	Amended statement of contents of appellants' appendix.
"	25	Motion of appellants for leave to amend first amended complaint, with memorandum in support and proof of service.
"	28	Twenty copies of brief and appendix for appellants.
Mar.	3	Proof of service of brief and appendix for appellants.
"	18	Four typewritten copies of appellee's objection to appellants motion for leave to amend first amended complaint, filed by Henderson Co.
"	18	Four typewritten copies of statement of Commonwealth of Kentucky in reply to motion of appellants for leave to amend, etc.
"	31	Twenty copies of brief for appellee, Henderson County.
Apr.	17	Order sustaining appellants' motion for leave to amend first amended complaint (Miller, J.).
"	18	Twenty copies of reply brief of appellants.
"	18	Proof of service of reply brief of appellants.
Dec.	1	Four typewritten copies of motion for leave to file supplemental complaint, with memorandum, and proof of service.
"	1	Cause argued and submitted (Before: Allen, Martin & Miller, JJ.).
"	9	Four typewritten copies of answer of Ohio River Oil Company.

Docket Entries in Court of Appeals

1958		
"	9	Four typewritten copies of answer of Henderson County, etc.
"	10	Four typewritten copies of answer of Commonwealth of Kentucky, etc.
"	18	Order overruling motion of appellants for leave to file a second supplemental complaint (Miller, J.).
"	18	Order affirming judgment of District Court (Miller, J.).
"	18	Opinion by Miller, J.
1959		
Jan.	7	Twenty copies of petition for rehearing and brief in support.
"	7	Certificate that appellants' petition is presented in good faith.
"	7	Proof of service of petition for rehearing.
"	22	Order denying petition for rehearing (Miller, J.).
Feb.	6	Mandate issued (no costs taxed). Opinion with mandate.
"	13	Certified record on application to Supreme Court for writ of certiorari furnished Mr. Walker.

ORDER SUSTAINING MOTION OF APPELLANTS TO AMEND THEIR AMENDED COMPLAINT—Filed April 17, 1958.

The motion of plaintiffs-appellants, Henry B. Walker, Jr., Trustee, et al., for leave to amend their amended complaint as set out in said motion filed herein on February 25, 1958, for the purpose of adding allegations of jurisdiction under Section 1331, Title 28, U. S. Code, having been considered by the Court,

It Is Ordered that said motion be sustained and the amended complaint be so amended. Section 1653, Title 28, U. S. Code; Norton v. Larney, 266 U. S. 511, 516; Smith v. McCullough, 270 U. S. 456, 460.

SECOND AMENDED COMPLAINT.

Plaintiffs for their amended complaint, complain of the defendants and say:

1. That the plaintiffs are each citizens of the State of Indiana; that the defendant Felmont Oil Corporation is a corporation existing under and by virtue of the laws of the State of Delaware; that the defendant The Carter Oil Company is a corporation organized and existing under and by virtue of the laws of West Virginia; that the defendant, Ben M. Strother is a citizen of the Commonwealth of Kentucky; that the defendant Ohio River Oil Company, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Kentucky; that the defendant, The Kentucky State Property and Buildings Commission is an instrumentality of the Commonwealth of Kentucky and domiciled therein; that Henderson County is a county in the Commonwealth of Kentucky; that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00).

Second Amended Complaint

1(a). That this action arises under the Constitution of the United States, Article 1, Section 10, and the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. That this action is for a declaratory judgment pursuant to 28 U. S. C. A. 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

2(a). That this action is brought pursuant to 28 U. S. C. A. §1331, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

3. That the plaintiff, Henry B. Walker, Jr., Trustee, is the successor Trustee in a certain Declaration of Trust dated the 24th day of April, 1940, executed by Clarence F. Schaeffer, a copy of which Declaration of Trust is attached to the original complaint herein marked "Exhibit A" and is made a part of this amended complaint by reference: that the said Clarence F. Schaeffer died on the 25th day of October, 1947, and thereafter on the 15th day of December, 1947, this plaintiff was, at a special meeting of registered unit holders, elected as the successor Trustee and that this plaintiff has been acting as such Trustee since that date.

4. That on the 25th day of March, 1940, certain real estate, being the land involved in this proceeding, lying in Henderson County, Kentucky, was conveying to the said Clarence F. Schaeffer, as Trustee, by deed, a copy of which deed is attached to the original complaint marked "Exhibit B" and is made a part thereof by reference. That one of the grantors in said deed was one Ione Carter; that the said Ione Carter received her title to that portion of the real estate owned by her in the following manner, to-wit: that on or about the 24th day of December, 1938, she filed her petition in the Henderson County Court for

the purpose of entering and having surveyed Two hundred (200) acres of vacant and unappropriated land in said county, which said petition is set out in full in the entry hereinafter referred to and included in this pleading; that all legal steps required by statute in connection with the filing of said petition in said court were taken. That acting in said proceeding one C. W. McElroy as surveyor filed his report in said Court showing that one William DeKemper and one Thomas B. Crafton, two disinterested housekeepers, had examined and checked said plat, a copy of which said report marked "Exhibit C" is attached to the original complaint and is by reference made a part hereof. That thereafter, on the 15th day of February, 1939, the said Court, after being duly advised in the premises, entered an order therein, a copy of which said order marked "Exhibit D" is attached to the original complaint and is made a part hereof by reference. That thereafter, on the 25th day of July, 1939, the said Ione Carter received two grants from the Commonwealth of Kentucky, marked respectively "Exhibit E" and "Exhibit E2", copies of which said grants are attached to the original complaint and made a part hereof by reference and which said grants were duly recorded in the office of the Clerk of Henderson County Court on the 27th day of October, 1939, in Deed Book 95 at page 188 of the records of said Henderson County Court. That each of the grantors in the deed to Clarence F. Schaeffer, Trustee (Being "Exhibit B"), either in the years 1937, 1938 or 1939 took similar steps in the Henderson County Court and similar surveys were made and orders were entered. That in said deed to said Trustee there is set out in the descriptions the particular parcels of ground which each of said grantors entered, and for which they received deeds; that this Trustee, the plaintiff herein, and his predecessor Trustee have each actively claimed title to said real estate since the execution of said deed and have in connection therewith negotiated oil leases to portions thereof and

have sold certain parcels therefrom retaining oil rights therein, namely the parcel granted by the Commonwealth of Kentucky to John E. Early, and the parcel granted to Margaret McCarty and the parcel granted to Hattie M. Falk and the parcel granted to Lucy B. Walker. That said Trust Agreement is still in effect; that this Trustee as such Trustee, is the owner of the real estate contained in said deed as against all of the defendants herein.

5. That the plaintiffs John H. Bower, James C. Bower and Henry B. Walker are the owners as tenants in common of the following described real estate in Henderson County, Kentucky:

> Beginning at a point in the Ohio River at low water mark on the Indiana Side of said river where the line of Marrs and Black Township intersects said low water mark a corner of James C. Bower's 199 acres, running thence with said low water line (being the line between Indiana and Kentucky) a northwesterly direction, binding on said line 82 chains to a point in said line 8 chains southeast of the corner of fractional sections 25 and 26 Black Township, Posey County, Indiana, a corner of P. H. Lockett's 200 acres, thence with the same due south 15 chains to point in the river, thence parallel with the first line, up the river southeast 82 chains to a corner of James C. Bower's 199 acres; thence with same due north 15 chains to the place of beginning and containing 120 acres. Said tract being opposite fractional section 25 Black Township and almost opposite the town of Alzey, Kentucky, and 1½ miles below Diamond Island.
>
> Also beginning at a point opposite the east end of Diamond Island at low water mark in the Ohio River a corner of the 100 acre survey dated July 15, 1898, and conveyed to George W. Bement, Jr. Deed Book 41, page 86, Henderson County Clerk's office, running thence up the river binding on the line of

Kentucky and Indiana an easterly direction 56 chains to a point in the river at low water mark, a corner of fractional sections 23 and 24 Marrs Township, Posey County, Indiana, and about 1½ miles below the town of West Franklin, a corner of Miss Dorothy Walker's 198 acres, thence with same due south 15 chains to point in said Ohio River another corner of the 198 acres thence down the river parallel with the first line 54 chains to the line of the above mentioned 100 acres, thence with same N 15W 15 chains to the beginning and containing 80 acres. Said tract being between Diamond Island and a point about 1½ miles below West Franklin, Indiana, and in front of Section 23 Marrs Township. Making a total of 200 acres in both tracts.

Also beginning at a point in the Ohio River at low water mark on the north side it being in the line of the State of Kentucky and Indiana at the corner of Black and Marrs Township, Posey County, Indiana, running thence east along said state line, binding on the low water line, 128 chains to a point in Fractional section 29 Marrs Township and a corner of the 100 acres conveyed to George Bement April 3, 1899, and of record in Deed Book 41 page 85 Henderson County Clerk's office, thence with a line of said 100 acres S40E 15 chains to a point in the Ohio River at the lower end of Diamond Island, thence down the river west 139 chains to John Bower's 120 acres, thence with same due north 15 chains to the place of beginning and containing 199 acres. Said tract being just below Diamond Island binding along fractional sections 29 and 40 Marrs Township, Posey County, and almost opposite the town of Alzey, Kentucky.

That title to said tracts of real estate were obtained by taking the steps in Henderson County Court and by similar surveys and orders as described in paragraph 4 hereof,

in the years 1938 and 1939. That they have actively claimed title to said real estate since that time.

6. That the plaintiffs John H. Bower, James C. Bower and Henry B. Walker are the owners as tenants in common, of the following described real estate in Henderson County, Kentucky, having acquired the same by deed in 1938, to-wit:

> A tract of land in Henderson County known as Diamond Island together with all riparian rights and accretions thereto in the Ohio River approximately eleven (11) miles below the town of Henderson, Kentucky, together with the 100 acre survey dated July 15, 1898, and conveyed to George W. Bement, Jr., Deed Book 41, page 86, Henderson County Clerk's office. Also the one hundred (100) acre tract conveyed to George W. Bement, Jr., April 5, 1899, Deed Book 41, page 85, Henderson County Clerk's office. Included in this conveyance is all of sections twenty-three (23), twenty-two (22), twenty-eight (28) and twenty-nine (29) in Township seven (7) south, range twelve (12) west, Posey County, Indiana, as though the same were extended beyond the north bank of the Ohio River southward to Diamond Island proper and being all in Henderson county.

That a part of said real estate adjoins Diamond Island proper and at low water line before the present lock and dam system fixing a nine foot stage in the Ohio River, extended Diamond Island to within thirty feet of the Indiana shore line. That said area has been treated and considered as a part of Diamond Island and has been taxed since 1896 and taxes on this particular area have been paid by these plaintiffs and their predecessors in interest to the sheriff of Henderson County for more than fifty years. That they and their predecessors in title have actually claimed title to said real estate for over fifty years.

7. That on the 19th day of October, 1953, the defendant, Henderson County, Kentucky, entered into an oil lease with the defendant Felmont Oil Corporation, a copy of which said lease marked "Exhibit F" is attached to the original complaint and made a part hereof by reference. That said lease covers land owned by this plaintiff Trustee as hereinbefore set out; that said lease is a cloud upon the title of plaintiffs; that Felmont Oil Corporation claims some interest in said lands by reason of said lease; that the said Henderson County retains an interest in the mineral rights in said lease and also claims the right to make other and similar grants; that all of said claims insofar as they affect the lands of the plaintiff as hereinbefore set out, are unfounded and without right.

8. That on the 21st day of December, 1953, Henderson County, Kentucky, entered into an oil and gas lease with the defendant, Ben M. Strother, a copy of which said lease marked "Exhibit G" is attached to the original complaint and is made a part hereof by reference. That said lease covers lands owned by this plaintiff as hereinbefore set out; that said lease is a cloud upon the title of plaintiffs; that said Ben M. Strother has assigned his interest in said lease to the defendant The Carter Oil Company which defendant company claims some interest in said lands by reason of said lease; that the said Henderson County retains an interest in the mineral rights in said lease and also claims the right to make other and similar grants; that all of said claims insofar as they affect the lands of the plaintiff and hereinbefore set out, are unfounded and without right.

9. That on the 7th day of August, 1952, the Kentucky State Property and Buildings Commission, an agency of the Commonwealth of Kentucky, entered into a certain contract with the defendant, Ohio River Oil Company, Inc. a copy of which said contract marked "Exhibit H" is attached to the original complaint and is made a part hereof by reference. That said contract covers in part, lands owned by these plaintiffs as hereinbefore set out; that said con-

tract is a cloud upon the title of plaintiff; that Ohio River Oil Company, Inc., claims some interest in said lands by reason of said lease; that the Commonwealth of Kentucky through said Commission retains an interest in the mineral rights in said lease and also claims the right to make other and similar grants; that all of said claims, insofar as they affect the lands of the plaintiffs as hereinbefore set out, are unfounded and without right.

10. That the Kentucky State Property and Buildings Commission, in purporting to administer the Kentucky State Property and Buildings Commission Act, Acts of 1949, Chapter 11, claims the ownership of and the power to dispose of the land owned by the plaintiffs. That the said Commission has attempted to deprive the plaintiffs of the use and enjoyment of their lands and has disposed of the oil rights under said lands by leasing them to others and has removed or threatened to remove and has encouraged and aided others in removing, large amounts of oil from under said lands. That all of said acts, to the extent that they were not authorized by the Kentucky State Property and Buildings Commission Act, Acts of 1949, Chapter 11, have been committed by said Commission without right or authority and have deprived the plaintiffs of their property without due process of law, and have impaired the obligations of the patent contracts which have previously been issued, granted and entered into by the Commonwealth of Kentucky.

11. That the Commonwealth of Kentucky, acting by and through its State Property and Buildings Commission and by and through other officers and agents of the Commonwealth, in purporting to administer the Kentucky State Property and Buildings Commission Act, Acts of 1949, Chapter 11, claims the ownership of and the power to dispose of the lands owned by the plaintiffs. That the said Commonwealth has attempted to deprive the plaintiffs of the use and enjoyment of their lands and has disposed of the oil rights under said lands by leasing them to others

and has removed or threatened to remove, and has encouraged and aided others in removing, large amounts of oil from under said lands. That all of said acts, to the extent that they were not authorized by the Kentucky State Property and Buildings Commission Act, Acts of 1949, Chapter 11, have been committed by said Commonwealth without right or authority and have deprived the plaintiffs of their property without due process of law, and have impaired the obligations of the patent contracts which have previously been issued, granted and entered into by the Commonwealth of Kentucky.

12. That the Kentucky State Property and Buildings Commission Act, Acts of 1949, Chapter 11, to the extent that it does, in fact, authorize and empower the Commonwealth of Kentucky or its State Property and Buildings Commission or any other officer or agent of the Commonwealth to commit acts injurious to the plaintiffs or their rights or which deprive them of their property without due process of law or which impair the obligations of patent contracts which they hold from the Commonwealth of Kentucky is unconstitutional and of no force and effect.

Wherefore, plaintiff Trustee prays that the Court adjudge that this plaintiff as Trustee is, as against each of the defendants herein, the owner of the real estate situate in Henderson County, Kentucky, described as the various parcels set out in the deed being plaintiffs' "Exhibit B", and plaintiffs James C. Bower, Personal Representative of the Estate of John H. Bower, Deceased, James C. Bower, Trustee under the Will of John H. Bower, James C. Bower and Henry B. Walker pray that the Court adjudge them to be the owners as tenants in common, as against each of the defendants herein named, of the real estate in Henderson County, Kentucky, described in paragraphs 5 and 6 hereof, and all of said plaintiffs pray that the Court adjudge that the claims of the defendants and each of them as affecting said real estate are unfounded and without right and that the defendants nor any of them have any

interest in said real estate, and all of said plaintiffs further pray that the defendants, the Commonwealth of Kentucky and its State Property and Buildings Commission and its officers and agents, be restrained and enjoined from interfering with the plaintiffs in their use and enjoyment of their land or with the lands of the plaintiffs, and that the State Property and Buildings Commission Act, Acts of 1949, Chapter 11 to the extent that it affects the lands of the plaintiffs, be declared unconstitutional, null and void and of no force and effect, and that the plaintiffs recover all of their costs herein laid out and expended.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT—Filed December 1, 1958.

Plaintiffs move the court for leave to file a Second Supplemental Complaint, a copy of which is attached hereto as "Exhibit A".

In support of their motion plaintiffs state:

a. The transactions, occurrences and events have happened since the time of the plaintiffs' original complaint.

b. It is in the interest of justice that all issues between plaintiffs and defendants be litigated in this action and, as far as possible, be set out in the complaint.

MEMORANDUM.

This Court has the power to grant the above motion under Rule 15(d) of the Federal Rules of Civil Procedure, which rule provides for the filing of supplemental pleadings. As is provided in Rule 1, these rules "shall be construed to secure the just, speedy and inexpensive determination of every action."

All of the facts alleged in said supplemental complaint have been known to all of the parties to this action since their occurrence. The legal significance and effect of these

facts has been briefed by plaintiffs-appellants in their brief on the appeal now pending in this Court. The two propositions made by plaintiffs-appellants are:

1. The patents here involved are regularly issued, are signed by the proper officers, are in due form and are presumptively valid and are, therefore, not subject to any collateral attack. (42 American Jurisprudence, Public Lands, Section 86, page 861)

2. Even though there might have been grounds on which the patents could have been held to be invalid, the only remedy available to the Commonwealth was to bring a direct action to rescind the patents. (42 American Jurisprudence, Public Lands, Section 86, page 861)

Exhibit B to the plaintiffs' original complaint gave the exact date on which each of the patents was granted. All of the parties to this action are presumed to have known that the time within which a direct action by the Commonwealth could have been brought to rescind the patents expired on July 25, 1954. All of the parties to this action know that no such action was brought within that period. All of the parties to this action are presumed to know that the patents here involved are not subject to collateral attack. Inasmuch as no party defendant has attempted to answer or reply to the propositions made by plaintiffs-appellants, it can be assumed that all of the defendants-appellees agreed with such propositions or could find no legal defense to them.

This action has been in litigation for more than four years, and the granting of this motion by this Court can effectively "secure the just, speedy and inexpensive determination" of this action since the invoking of the Statute of Limitations will bar forever any further contesting of the legality of the patents here involved by any of the defendants-appellees. Plaintiffs-appellants urge that for complete justice to be done this motion should be granted.

SECOND SUPPLEMENTAL COMPLAINT—Filed December 1, 1958.

Plaintiffs for their supplemental complaint complain of the defendants and say:

a. That on the 26th day of July, 1954, the period of time of fifteen years within which an action must be brought for the recovery of real estate as provided for in Kentucky Revised Statutes 413.010 expired, inasmuch as the last four of the patents involved in this litigation were granted on July 25, 1939.

b. That no action had been brought by any party prior to the expiration of the Statute of Limitations, and no direct action has been brought by the Commonwealth of Kentucky at any time.

c. That no party defendant nor any other party whatsoever, except the plaintiffs, has any rights in the patents involved in this litigation.

Wherefore, plaintiffs pray in all respects as in their Second Amended Complaint and First Supplemental Complaint; and pray further that the court adjudge that the Statute of Limitations has run as to the lands here involved and that all of the parties defendant be forever barred from maintaining any action of any kind questioning or contesting the legality and validity of the plaintiffs' patents.

ANSWER OF HENDERSON COUNTY, KENTUCKY—Filed December 9, 1958.

Henderson County denies each and every allegation contained in the amendments to the Complaint and in the "Second Supplemental Complaint" as filed by Henry B. Walker, Jr., Trustee, in the United States Court of Appeals for the Sixth Circuit.

Wherefore, Henderson County continues to pray as in its original Answer, and for all other relief to which it may be entitled.

ANSWER OF OHIO RIVER OIL CO., INC.,—
Filed December 9, 1958.

Comes defendant-appellee, Ohio River Oil Company, Inc., pursuant to leave granted in open court on December 1, 1958, and files this its answer to plaintiff-appellants' amended complaint and supplemental complaint filed in this action in this court.

1. Defendant-appellee denies each and every material allegation contained in the amended complaint.

2. Defendant-appellee denies each and every material allegation contained in the supplemental complaint.

Wherefore, defendant-appellee prays as in its answer and cross-complaint and as herein.

ANSWER OF COMMONWEALTH OF KENTUCKY AND STATE PROPERTY AND BUILDINGS COMMISSION—Filed December 10, 1958.

Come defendants-appellees, Commonwealth of Kentucky and State Property and Buildings Commission, pursuant to leave granted in open court on December 1, 1958, and file their answer to plaintiff-appellants' amended complaint and supplemental complaint filed in this action in this court.

1. Defendants-appellees deny each and every material allegation contained in the amended complaint.

2. Defendants-appellees deny each and every material allegation contained in the supplemental complaint.

Wherefore, defendants-appellees pray as in their answer and cross-complaint and as herein.

ORDER OVERRULING MOTION OF APPELLANTS FOR LEAVE TO FILE SECOND SUPPLEMENTAL COMPLAINT—Filed December 18, 1958.

The motion of appellants for leave to file a second supplemental complaint is hereby overruled.

AFFIDAVIT OF HENRY B. WALKER, JR.

State of Indiana }
County of Vanderburgh } ss:

Henry B. Walker, Jr., being first duly sworn, deposes and says:

He is one of the counsel for the petitioners in a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the cause designated as Henry B. Walker, Jr., Trustee, et al. v. Felmont Oil Corporation, et al.

He was present in the Sixth Circuit Court of Appeals on December 1, 1958, representing the petitioners who were the plaintiff-appellants in that proceeding for the purpose of participating in an oral argument on an appeal then pending in said court. The following defendants-appellees were present at the oral argument: Carter Oil Company by John D. Knodell, Jr., Esq.; Henderson County by Morton Holbrook, Esq.; Ohio River Oil Company by Chat Chancellor, Esq. Mr. Chancellor advised the court that since the Honorable Jo M. Ferguson, Attorney General of the Commonwealth of Kentucky, was not able to be present he, Mr. Chancellor, had been authorized to speak on behalf of the Commonwealth of Kentucky and the Kentucky State Property and Buildings Commission.

Prior to the oral argument, the affiant had filed on behalf of the plaintiffs-appellants their motion for leave to file a supplemental complaint and memorandum in support

thereof. Copies of this motion, together with the second supplemental complaint, were distributed to the Judges prior to their taking the bench.

During the oral argument, Judge Allen, the Chief Judge of the court, introduced the matter of the motion and asked the plaintiffs-appellants if they wished their motion to be considered at that time. A discussion ensued during which this affiant advised the court that service by mail had been made on all the parties and that in the ordinary course of mail delivery copies of the motion would have been received that morning in the offices of the counsel present and that they would not have had an opportunity to see the motion. Since extra copies were available, this affiant offered to distribute them to the opposing counsel present, which was done. Judge Allen thereupon asked the defendants-appellees if they had any objections to the motion being granted. No objections were made and Judge Allen then stated that the motion for leave to file a supplemental complaint was granted. Morton Holbrook, Esq., and Chat Chancellor, Esq., then asked the court for leave to file answers both to plaintiffs-appellants' second amended complaint, which had been filed April 17, 1958, and to plaintiffs-appellants' second supplemental complaint, which had just been filed by leave of court on that day, December 1, 1958. Judge Allen then asked the plaintiffs-appellants if they had any objections to this request, and being advised that no objections were made by plaintiffs-appellants, Judge Allen then stated that defendants-appellees were granted leave to file answers.

This affiant was vitally interested in the rulings of the court and was paying particular attention thereto. There was no question in his mind but that the motion for leave to file had been granted and that the second supplemental complaint, which was attached to the motion, had thereupon automatically been filed. This affiant assumed that a written record of the proceedings of the Court of Appeals was kept by the court and that the action taken would be

included in the record either as written orders as as written minutes in the docket. Not until a request was made to the Clerk of the Court for the certified record in the case was this affiant informed that there was no written record of the proceedings held in open court on December 1, 1958. After a number of letters were exchanged and telephone calls had been made to the Clerk of the Court, this affiant learned that apparently the record could not be corrected without some action by the court itself. He thereupon sent identical letters to the three members of the court who were therein sitting. Correspondence was had also with opposing counsel in the case and no feasible method was proposed for correcting the record so that it would reflect accurately the proceedings which took place.

This affiant further says that the foregoing statement is true and correct to the best of his knowledge and belief.

(s) Henry B. Walker, Jr.

(Jurat dated June 6, 1959)

AFFIDAVIT OF WILLIAM G. GREIF.

State of Indiana)
County of Vanderburgh) ss:

William G. Greif, having been duly sworn on his oath deposes and says:

That he was one of the attorneys of record for the petitioners and that he assisted in the preparation of and filing of the supplemental complaint, motion for leave to file same and memorandum attached thereto, all before the Sixth Circuit Court of Appeals.

That he no longer is associated either with this case or with the firm of Walker & Walker, attorneys.

That he has read the affidavit of Henry B. Walker, Jr., and affirms said affidavit and makes it a part of this sworn statement; that in addition to the facts set out therein, he had a conversation with Mr. Morton Holbrook, attorney for Henderson County, following the appearance in court on December 1, 1958, in which Mr. Holbrook expressed amusement at plaintiffs-appellants' success in having filed a supplemental complaint in an appellate court.

This affiant further says that the foregoing statement is true and correct to the best of his knowledge and belief.

(s) William G. Greif.

(Jurat dated June 6, 1959)

LETTER OF DECEMBER 4, 1958, FROM MORTON HOLBROOK, ATTORNEY FOR HENDERSON COUNTY, TO CARL W. REUSS, CLERK, UNITED STATES COURT OF APPEALS.

Dear Mr. Reuss:

I enclose herewith an Answer to be filed by Henderson County, Kentucky, to the amended and supplemental pleadings which Henry B. Walker, Jr. has tendered in the United States Court of Appeals for the Sixth Circuit. Frankly, I have never before had the experience of making up pleadings in the appellate court and I am a little bit puzzled as to how it is done.

At the oral argument in this case on December 1st, I saw for the first time the "Motion for Leave to File Supplemental Complaint" which the appellants had mailed to me from Evansville, Indiana, at 4:00 p. m. on Saturday, November 29, 1958, and which, of course, I had not received at the time of the hearing in Cincinnati.

When I was asked from the bench whether Henderson County objected to the filing of this "Supplemental Complaint", I made a quick appraisal and said that we did not object. Actually, on more mature reflection, I do not believe that Rule 15(d) of the Federal Rules of Civil Procedure, cited by Mr. Walker as authority for the filing of this supplemental pleading, has the remotest connection with the filing of pleadings in the Court of Appeals. Rule 1 states specifically that the Rules of Civil Procedure govern "the procedure in the United States District Courts . . . ."

I find nothing in these Rules purporting to cover the making up of pleadings in the Court of Appeals and, as I indicated in my brief in support of my objection to the first amendment tendered by the appellants in the Court of Appeals, I do not believe it appropriate that new issues should be formed in the appellate court.

Nonetheless, *I rather understood that the Court meant to allow this latest pleading to be filed*, and in that event, I do not wish to be accused of admitting by default the allegations contained in *the pleadings so filed.* (Italics added.)

LETTER OF MARCH 11, 1959, FROM HENRY B. WALKER, JR., TO JUDGE FLORENCE ALLEN, JUDGE SHACKELFORD MILLER, JR., AND JUDGE JOHN D. MARTIN, SR.

Dear Judge Miller:

On December 1, 1958, oral argument was had in the above entitled cause. Prior to the arguments plaintiffs-appellants filed their motion for leave to file supplemental complaint and memorandum in support thereof. Copies of this motion together with the second supplemental complaint were distributed to the judges. During the argument Judge Allen brought up the matter and asked the defendants-appellees if they had any objections to the motion being granted. No objections were made and Judge Allen then stated that the motion for leave to file second supplemental complaint was granted. Defendants-appellees then asked the court for leave to file answers to plaintiffs-appellants amended complaint which had been filed April 17, 1958, and plaintiffs-appellants second supplemental complaint which was filed on that day, December 1, 1958. Judge Allen asked the writer if he had any objections and he stated that he did not and Judge Allen then stated that the defendants-appellees motion was granted.

Plaintiffs-appellants have assumed that the court reporter made a record of the granting of these motions and that a minute would have been entered on the docket. Plaintiffs-appellants believe that they are correct in assuming that the second supplemental complaint was filed and became a part of the record upon the granting of the aforementioned motion.

On December 18, 1958, the same date as the opinion and judgment in this case, Judge Miller signed a written order overruling motion of plaintiffs-appellants for leave to file second supplemental complaint. One of the contentions of plaintiffs-appellants in their petition for rehearing was that this order could not expunge from the record their second supplemental complaint.

Letter of March 11, 1959, from Henry B. Walker, Jr.

Plaintiffs-appellants have been attempting to secure from the clerk the certified record in this case. The docket entries do not show the filing of the second supplemental complaint nor do they show the granting of either of the motions in open court. The clerk of the court has written: "If there was no written order made by the court covering these two items, I am, of course, unable to include it." Plaintiffs-appellants believe that they should be entitled to a certified record which correctly shows the proceedings in the Court of Appeals. They would appreciate it very much if the record could be corrected and the clerk advised to make a written minute of the granting of the motions and the filing of the second supplemental complaint so that these matters can be made a part of the certified record.

LETTER OF MARCH 13, 1959, FROM JUDGE FLORENCE E. ALLEN TO HENRY B. WALKER, Jr.

Your letter of March 11 has been received and duly considered.

LETTER OF MARCH 23, 1959, FROM JUDGE SHACKELFORD MILLER, JR., TO HENRY B. WALKER, JR., WITH COPIES SENT TO ALL MEMBERS OF THE COURT AND COUNSEL OF RECORD.

I am not completely in agreement with your version of the proceedings in this case on December 1, 1958, as outlined in your letter of March 11, 1959. Apparently, a misunderstanding exists and I am glad to answer your letter for the purpose of seeing what might be done about it.

It was my understanding that the second supplemental complaint referred to in your letter was tendered for filing at that time and that presiding Judge Allen inquired of

opposing counsel if they had any objection thereto, to which they replied that they did not. You are of the opinion that an oral ruling was thereupon made sustaining the motion to file, although such a ruling was not later embodied in any written order. You ask that such a written order be now entered as of that date. I was of the opinion that the order was tendered and that a ruling upon the motion to file would be made after he had had an opportunity to consider it. Since the second supplemental complaint was brought to the attention of the Court just prior to the oral argument when little opportunity was available for giving it any consideration, individually, I would not have been in agreement with an order to be entered at that time filing the second supplemental complaint because of not understanding exactly what it contained or what was its purpose. This view on my part of the proceedings is reflected in the written opinion which is now reported at 262 F. (2) 163, at page 165. However, I can understand your view of the matter in assuming that it was permitted to be filed and that an order should have been entered to that effect. The difference of views between us does not seem to be of any material effect as hereinafter pointed out

Even though the supplemental complaint was ordered filed, would not the Court be permitted upon reconsideration of the matter to change its ruling and order it to be stricken? If so, in accordance with the views expressed in our written opinion, any order now entered to the effect that the motion to file was sustained on December 1, 1958, would also provide that upon reconsideration it was ordered stricken. Do you feel that there is any material difference in the legal question involved in (1) overruling the motion that it be filed, and (2) permitting it to be filed and thereafter striking it from the record?

If you think that there is some material difference in the legal situation, then we have the present problem. I am advised by the Clerk that the petition for rehearing was denied on January 22, 1959, and no motion having been

made for stay of mandate, the mandate was issued to the District Court on February 6, 1959. The general rule seems to be that following the issuance of the mandate the appellate court loses jurisdiction of the case. Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F. 2d 764, 770, C. A. 3rd; 3 American Jurisprudence, Appeal and Error, Sec. 1263. Although we might be able to reacquire jurisdiction by a recall of the mandate, Rule 24(2) of our Court provides that a mandate will not be recalled except by order of the Court for good cause shown. If you wish that the record be supplemented by an additional order as of December 1, 1958, you, of course, can make a motion that the mandate be recalled, in which event the motion should be supplemented by your affidavit of what you believe the facts to be. Of course, notice of such a motion must be given to opposing counsel who would be entitled to present by affidavit their own version of what took place. It may be that you and opposing counsel will be in agreement about this or it may be that you will disagree about it, but in either event, the matter would then be presented to the Court for a ruling on the motion to recall the mandate and supplement the record.

I am sending a copy of this letter to opposing counsel so that all of you will have my views about the matter and can take whatever proper steps any of you feel should be taken in this case.

LETTER OF MARCH 28, 1959, FROM HENRY B. WALKER, JR., TO ALL COUNSEL OF RECORD, WITH COPIES TO ALL MEMBERS OF THE COURT.

We have been attempting for some time to obtain from the Clerk of The Sixth Circuit Court of Appeals the certified record in the above case. Mr. Carl W. Reuss advised us that, since no written order was made granting the plaintiffs-appellants' motion for leave to file its second supplemental complaint and no written order was made granting defendants-appellees' oral motion for leave to file answers to the amended complaint and the supplemental complaint, he could not include these orders or rulings in the certified record.

On March 11, 1959, we wrote identical letters to Judge Allen, Judge Miller and Judge Martin. We are enclosing herewith a copy of our letter to Judge Miller. Each of you received a copy of Judge Miller's letter of March 23, 1959. We are answering that letter today and enclose a copy of our answer herewith.

Judge Miller, in his letter, has stated his version of what happened. We sincerely believe that our version of the circumstances corroborated by the answer filed by three of the defendants-appellees is the more correct version. No criticism of Judge Miller is intended or implied. At the time, Judge Allen was Chief Justice and made the rulings and they were of more vital concern to her and the counsel present than they would have been at the moment to either Judge Miller or Judge Martin.

I would appreciate it very much if those of you who were present at the time could advise me of the nature of the rulings as you remember them and understood them at the time. Regardless of partisanship, we are sure that each of you is as anxious to have the record reflect the proceeding correctly, as we are.

LETTER OF MARCH 28, 1959, FROM HENRY B. WALKER, JR., TO JUDGE SHACKELFORD MILLER, JR., WITH COPIES SENT TO ALL MEMBERS OF THE COURT AND COUNSEL OF RECORD.

We very much appreciate your letter of March 23, 1959, and the thorough and careful consideration of the matter which your letter indicates you have given.

We do not wish to burden the Court or the opposing counsel with any unnecessary proceeding. But after careful consideration we are of the opinion that there is a material difference in the legal question involved in (1) overruling the motion that it be filed, and (2) permitting it to be filed and thereafter striking it from the record. We attempted to raise this point in our petition for a rehearing and urged that, if the Court had sincerely questioned the propriety of its having granted leave to file the supplemental complaint, it should then have remanded the case to the District Court with directions that the supplemental complaint be permitted to be filed therein, rather than to have overruled the motion.

As was pointed out in our letter of March 11, there was no question in the minds of either the writer or Mr. William G. Greif, both of whom were present in the courtroom, that the motion had been granted and that leave was also given to the defendants to file answers to the amended complaint, even though they were technically in default for having failed to file timely answers, as well as to the supplemental complaint. The record will show that this must have been the understanding which the defendants had, since the Ohio River Oil Company, Inc., Henderson County, and the Commonwealth of Kentucky, each of which was represented at the hearing, did in fact file answers to the amended complaint and the supplemental complaint and each refers in its answer to the supplemental complaint filed in this action.

Letter of March 28, 1959, from Henry B. Walker, Jr.

We have not discussed this matter with any of the opposing counsel and we cannot know, of course, what their versions might be, except from the actions which they took in filing answers as set out above. We are writing to each of them, a copy of which letter is attached hereto, and enclosing a copy of our letter to you of March 11, 1959, and a copy of this letter. They will already have a copy of your letter. As soon as we can determine their reactions, we will take such steps as we feel are necessary, as suggested in your letter. We are not asking for any special consideration or favor. We only want the record of the proceedings in the Court to reflect accurately whatever took place. If the Court should determine that the circumstances were as outlined in our two letters, we feel that there is authority for the Court to reconsider its decision on its own motion, even at this date, and remand the case to the District Court for a reconsideration of the case on the basis of the amended complaint and the supplemental complaint, regardless of whether the supplemental complaint was finally permitted to be filed in this Court or whether directions be given that it be permitted to be filed in the District Court.

Appellants are well aware that the questions involved in this matter are unusual, if not unique; and they believe most sincerely that justice would best be served and the time required for the litigation of this matter be shortened if a reconsideration of this matter by the Court on its own motion could be granted.

LETTER OF APRIL 6, 1959, FROM MORTON HOLBROOK, ATTORNEY FOR HENDERSON COUNTY, TO HENRY B. WALKER, JR.

It was my understanding that your second supplemental complaint was tendered but not filed on December 1, 1958.

My memory of what transpired is that you submitted your motion to file the pleading, Judge Allen inquired if counsel had any objection to the filing, none was expressed, Chat Chancellor said that he wanted leave to file a responsive pleading, and Judge Allen said something about your proceeding with your argument.

I thought that whether your motion would be sustained would be subsequently voted on by the three judges. Since none of the lawyers objected to the filing of the amended pleading, and since I had unsuccessfully opposed your previous effort to amend the pleading in the Court of Appeals, I assumed that the Court would probably vote to permit you to amend the pleadings again.

My thoughts about this matter were set out in a letter to the Clerk, dated December 4, 1958, a copy of which I sent to you and to other interested counsel. For your convenience in referring to that letter, I enclose a copy of it herewith.

LETTER OF MAY 1, 1959, FROM JO M. FERGUSON, ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY, TO HENRY B. WALKER, JR.

You have asked me to sign a stipulation in the above styled case which relates to certain events occurring in the oral argument of the case on December 1, 1958. I was not present at that time because of weather conditions which had caused me to miss my connections. By telephone, however, I had authorized Mr. Chat Chancellor to represent me to the extent of saying to the Court that I felt that all matters had been briefed and that no oral argument on behalf of the Commonwealth was necessary. In view of these circumstances, I do not believe that I can sign any stipulation which purports to outline circumstances with which I am not familiar.

LETTER OF MAY 15, 1959, FROM CHAT CHANCELLOR, ATTORNEY FOR OHIO RIVER OIL COMPANY, INC., TO HENRY B. WALKER, JR.

You have recently sent me a proposed stipulation as to certain proceedings had in the above styled action in the U. S. Court of Appeals for the Sixth Circuit.

I am not willing to sign the stipulation because I was not exactly clear as to what was happening at the time and am still not certain. It is true that you proposed the filing of your second supplemental complaint and stated that copies had been distributed to the judges prior to their taking the bench. It is likewise true that at that time you distributed copies to counsel present.

I certainly was under the impression that you were permitted to file both your amended complaint and your second supplemental complaint. That is evident from the fact that I asked the Court to permit us to respond thereto, which permission was granted, and responses were filed.

I am not at all certain, however, that Judge Allen "then stated that the motion for leave to file supplemental complaint was granted".

I know the pleadings were accepted physically, but am not clear as to whether the presiding judge announced from the bench that they were being "filed", that they could be "tendered", or merely said "allright" or some such similar expression when no one objected to the filing. I must frankly admit that while I arose to my feet prepared to make an objection because I had had no time to study the matter I did not actually make the objection but merely asked for time to respond in case any matter was contained in the pleadings that required a response.

Another reason that I am unwilling to sign the stipulation is based upon reasoning similar to that expressed by Judge Miller in his recent letter to you with copies to all opposing counsel that the Court certainly had authority to review the matter and strike your pleadings from the record even if it is true that they were permitted to be filed.

Now that this matter is rapidly passing beyond the jurisdiction of the Circuit Court of Appeals I cannot conscientiously stipulate that your pleadings are a part of the record when that stipulation would be at direct variance with the Court record and would fly in the face of Judge Miller's suggestion that if the record were amended to show that the pleadings were filed the Court quite possibly would have entered a subsequent order striking them from the record.

I am sending a copy of this letter to all parties. I believe it contains all I know about the matter and you are free to use it in any manner that you choose.

LETTER OF JUNE 5, 1959, FROM JOHN D. KNODELL, JR., ATTORNEY FOR CARTER OIL COMPANY, TO HENRY B. WALKER, JR.

You have recently sent me a proposed stipulation as to certain proceedings had in the above-styled action in the U. S. Court of Appeals for the Sixth Circuit. I prefer not to execute the stipulation because I cannot now recall the exact wording of Judge Allen's response to your request for leave to file your second supplemental complaint.

I did not pay particular attention to the colloquy between you and the court because I had already determined that the Carter Oil Company had no objections to the filing of your second supplemental complaint. I do know, however, that when the argument concluded it was my belief that you had been granted permission to file your second supplemental complaint.